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No. ....

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In the Supreme Court of the  
United States

OCTOBER TERM, 1983

HOPI INDIAN TRIBE,

*Petitioner,*

vs.

JOHN R. BLOCK, Secretary of Agriculture;  
NED D. BOYLEY, Acting Assistant Secretary of Agriculture for Natural Resources and Environment; R.  
MAX PETERSON, Chief Forester of the United States,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

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*Attorneys for Petitioner*

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## QUESTIONS PRESENTED

1. Whether American Indians are protected by the free exercise of religion clause of the first amendment to the United States Constitution in the same way and to the same extent as are other United States citizens, especially in light of the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. V 1981)?

2. Whether American Indians asserting that a proposed private commercial-recreational development on National Forest lands will seriously disrupt and harm their native religious culture, beliefs, and practices should be subject to a different and higher standard of proof than would apply to other Americans claiming the protections of the free exercise clause of the first amendment against federal government action? Specifically, must American Indians who claim that a proposed discretionary commercial-recreational development of National Forest lands will desecrate their religious shrines and seriously disrupt their religious beliefs and practices, show that such use of the lands will either penalize them for their religious faith and beliefs or impair their religious practices which cannot be performed at any other site, as a condition precedent to a traditional judicial free exercise clause evaluation of alternatives and balancing of interests otherwise applied to government-imposed burdens on religion?

3. Whether the American Indian Religious Freedom Act, 42 U.S.C. § 1996, imposes upon the federal administrators of National Forest lands a duty to protect and preserve American Indian religious beliefs and prac-

tices when such beliefs and practices will be destroyed or seriously disrupted by a proposed private commercial-recreational development of such lands, and if so, to what extent should such protection be afforded?

#### PARTIES TO THE PROCEEDINGS BELOW

The parties to CA. No. 81-1912 are listed in the caption to this petition.

The parties to CA. No. 81-1905 were Richard F. and Jean Wilson, plaintiffs-appellants, and John R. Block, Secretary of Agriculture; R. Max Peterson, Chief Forester of the United States; and Northland Recreations, Inc., an Arizona corporation, defendants-appellees.

The parties to CA. No. 81-1956 were the Navajo Medicinemen's Association and named Navajo and Hopi Indians,<sup>1</sup> plaintiffs-appellants, and Block, Peterson, and Northland (identified above); plus the United States Forest Service, Department of Agriculture; and the United States of America, defendants-appellees.

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<sup>1</sup> Faye B. Tso; Ashee Begay, Sr.; Tom Watson, Sr.; Miller Nez; Frank Bluehorse; Fred Stevens, Jr.; Francis D. Tsosie; Jim Charley; Hoskie Tom Becenti; Tony Trujillo; Jacob Poleviyaoma, Sr.; Jacob Poleviyaoma, Jr.; Jerry R. Sekayumptewa; and Lavern Siwump-tewa.



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**RELIEF REQUESTED**

Petitioner, the Hopi Tribe, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 20, 1983.

## OPINIONS IN THE COURTS AND AGENCY BELOW

The opinion of the court of appeals, *Wilson v. Block*, (App. "A", pp. 1-50) is reported at 708 F.2d 735-760 (D.C. Cir. 1983). The June 15, 1981 (App. "B", pp. 51-89) and May 14, 1982 (App. "C", pp. 93-102) memorandum opinions of the district court have not been officially reported, although portions of the June 15, 1981 memorandum opinion have been reprinted in the *Indian Law Reporter*, Vol. 8, pp. 3073-79.

The initial decisions of the Forest Supervisor, dated February 27, 1979 (App. "D", pp. 103-111), the Regional Forester, dated February 7, 1980 (App. "E", pp. 113-131), and the Chief of the Forest Service, dated December 31, 1980 (App. "F", pp. 133-145), are neither officially nor unofficially reported.

## JURISDICTION

The judgment of the court of appeals was entered on May 20, 1983. (App. "G", p. 147.) Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* which was denied on July 14, 1983. (App. "G", pp. 148-49.) A similar petition by the Navajo Medicinemen's Association was denied July 26, 1983. (App. "G", pp. 150-51.) No such petition was filed by Richard F. and Jean Wilson, who have separately petitioned this Court for a writ of certiorari regarding other issues dealt with in the May 20, 1983, opinion of the court of appeals. No order has been entered extending the time for this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Article I, Section 8, Clause 3:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2. United States Constitution, Article IV, Section 3, Clause 2:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to United States; . . . .

3. United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . .

4. The American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (August 11, 1978):

Whereas the freedom of religion for all people is an inherent right, fundamental to the democratic structure of the United States and is guaranteed by the First Amendment of the United States Constitution;

Whereas the United States has traditionally rejected the concept of a government denying individuals the right to practice their religion and, as a result, has benefited from a rich variety of religious heritages in this country;

Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;

Whereas the traditional American Indian religions, as an integral part of Indian life, are indispensable and irreplaceable;

Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians;

Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and regulations premised on a variety of laws;

Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;

Whereas such laws and policies often deny American Indians access to sacred sites required in their religions, including cemeteries;



Whereas such laws at times prohibit the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies;

Whereas traditional American Indian ceremonies have been intruded upon, interfered with, and in a few instances banned: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, [Section 1.]* That henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Sec. 2. The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the re-

sults of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

(Pub. L. No. 95-341 §1 is codified at 42 U.S.C. § 1996 (Supp. V 1981) and is referred to herein as "AIRFA".)

## STATEMENT OF THE CASE AND THE MATERIAL FACTS

This case concerns whether or not, in light of the religious claims and interests of the Hopi and Navajo Indians, the respondents, as officers of the United States Department of Agriculture and its Forest Service, have properly decided to issue permits for the expanded commercial-recreational development and use of a ski resort north of Flagstaff, Arizona, known as the Snow Bowl. The Snow Bowl is a 777 acre area located on the San Francisco Peaks (the "Peaks") in the Coconino National Forest. The National Forest is managed for the United States by the respondents and their subordinates. The Snow Bowl is a private commercial development operated under permit from the respondents.

Petitioner is a federally recognized American Indian tribe. It brought this action on its own behalf and on behalf of its approximately 9,000 members. The other plaintiffs-appellants before the courts and agency below are an association of Navajo Indian religious practitioners known as the Navajo Medicinemen's Association, several individual Navajo and Hopi Indians, and a non-Indian couple who are owners of lands located adjacent to the permit area on the Peaks. In addition to the 9,000 members of the Hopi Tribe, there are approximately 160,000 Navajos residing in the Hopi and Navajo Reservations to the northeast of the Peaks. See *Wilson v. Block*, 708 F.2d 735 at 738. (App. "A", p. 4.)

To petitioner, its members, and the other Indian plaintiffs, the Peaks are of a sacred religious character. The Peaks are directly involved in both practices and beliefs central and indispensable to the Indian plaintiffs in the practice of their traditional native religions. *See id.* at 740. (App. "A", pp. 4-5.) The commercial-recreational development of the Peaks in issue which the respondents have approved would be, in the opinion of the Indian plaintiffs, "a profane act, and an affront to their deities"; would cause the Peaks to "lose their healing power and otherwise cease to benefit the tribes"; would "impair their ability to pray, . . . conduct ceremonies, . . . and . . . gather from the Peaks the sacred objects . . . which are necessary to their religious practices." *Id.* at 740. (App. "A", p. 8.) The Indian plaintiffs believe such development "is grossly inconsistent with their beliefs" and that the development will "lead to serious adverse consequences for their peoples." *Id.* (App. "A", p. 9.) The court of appeals' opinion also quotes the testimony of the then Chairman of the Hopi Tribe as follows:

It is my opinion that in the long run if the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, our people will not accept the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people. If our people no longer possess this long-held belief and way of life, which will inevitably occur with the continued presence of the ski resort . . . a direct and negative impact upon our religious practices [will result]. The destruction

of these practices will also destroy our present way of life and culture.<sup>2</sup>

*Id.* n.2. (App. "A", p. 10.)

Notwithstanding this evidence recited in the court of appeals' opinion, that court ruled that the free exercise clause of the first amendment was not implicated by the proposed development, *i.e.*, that no constitutionally protected "burden" on religion had been shown, and it refused to proceed to conduct a traditional weighing of interests between the Indian religious beliefs and practices and the governmental interest in allowing a private commercial permittee to expand the Snow Bowl resort facilities, including an evaluation of less religiously intrusive alternatives.

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<sup>2</sup> Compare *Wisconsin v. Yoder*, 406 U.S. 205, 218-19 (1972):

The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practices of the Amish faith, both as to parent and child.

As the record shows, compulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into the society at large, or be forced to migrate to some other and more tolerant region.

In sum, the unchallenged testimony . . . support[s] the claim that enforcement of . . . compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondent's religious beliefs.

Prior to commencing this action, the plaintiffs below had all exhausted their administrative remedies within the Forest Service, United States Department of Agriculture. The Coconino National Forest Supervisor had rejected the several alternatives proposed in an Environmental Impact Statement ("EIS"), choosing instead what he called the "Preferred Alternative," of additional development for the Snow Bowl resort, its roads, ski lifts and associated facilities. See App. "D", pp. 103-111. Among the alternatives identified in the EIS as possible, lawful alternatives in regard to development of the Snow Bowl, but not chosen, were one to remove all recreational improvements from the Peaks and another simply to maintain the status quo, *i.e.*, permit existing developments to remain but allow no additional developments. The EIS recognized that these alternatives could lawfully be chosen without adversely affecting any vested property rights or interests.

The Forest Supervisor concluded that because input had been obtained from Indian religious practitioners, and because the Indians would still have access to the Peaks following the additional development, that the requirements of the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. §1996 (Supp. V 1981), had been met, and, therefore, the claimed adverse effect on the native religions would not deter the authorization of additional development pursuant to the "Preferred Alternative." See App. "D", pp. 103-111. The Final Environmental Impact Statement noted that "development will be considered adverse to the Native American religious

beliefs because commercial use and construction are not consistent with protecting the sacredness of the area."

That decision was appealed to the Regional Forester who, recognizing that "the expansion [approved by the Forest Supervisor] could violate the rights of American Indians to practice their religions," App. "E", p. 116, balanced that interest against a claimed public interest in greater development of the Snow Bowl. The Regional Forester concluded that the Forest Supervisor's decision should be modified to permit only the repair and replacement of existing facilities for compelling safety reasons; the "Preferred Alternative" of defined expansion was disapproved. See App. "E", pp. 113-131. The Regional Forester noted that "[t]he Snow Bowl . . . is not an outstanding winter sports area when measured against national standards, nor can it ever be made into one." App. "E", p. 129.

The decision of the Regional Forester was appealed to the Chief of the Forest Service. The Chief reversed the decision of the Regional Forester and restored the decision of the Forest Supervisor "which conditionally authorizes construction of additional facilities and reconstruction and improvement of the Snow Bowl Road." App. "F", p. 144.

The Secretary of Agriculture refused to undertake further review of the Chief Forester's decision.

The additional facilities authorized under the Pre-

ferred Alternative include 50 acres of new cleared ski runs (a 32% increase), a new ski lodge (a 100% increase), increased parking, widening and paving of the access road, and the construction of three new ski lifts (a 300% increase).

The Indian plaintiffs, including the petitioner, claimed below that such expansion would have a substantial adverse effect on their traditional native religious beliefs and practices. *See, e.g.*, 708 F.2d at 742: (App. "A", p. 13.)

Because the plaintiffs' religions are, in this sense, site specific, development of the Peaks would severely impair the practice of the religions if it destroyed the natural conditions necessary for the performance of ceremonies and the collection of religious objects. The plaintiffs claim that the Preferred Alternative will impair their religious practices in precisely that manner.

Each plaintiff initiated a separate lawsuit to challenge the decision of the respondents and their subordinates to allow the expansion of the Snow Bowl facilities pursuant to the Preferred Alternative. Petitioner asserted jurisdiction under 28 U.S.C. §1331 (Supp. V 1981) (federal question), 28 U.S.C. §1361 (1976) (mandamus), 28 U.S.C. §1362 (1976) (action by an Indian tribe), 28 U.S.C. §§2201-2202 (1976) (declaratory judgment and further relief), and 5 U.S.C. §§701-706 (1976) (judicial review of administrative action). The three cases were consolidated before the district court and an expedited decision was rendered based upon stipulated facts and



written witness statements. 708 F.2d at 739. (App. "A", pp. 6-7.)

The district court rejected the plaintiffs' claims on all issues, except that it remanded the case for compliance with the National Historic Preservation Act, 16 U.S.C. §§470-470n (Supp. V 1981). Following administrative consideration of the remanded issue, final judgment was entered by the district court dismissing all of the plaintiffs' claims.

The Indian plaintiffs each appealed the decision of the district court rejecting their claims under the first amendment and AIRFA. In an opinion dated May 20, 1983, the Court of Appeals for the District of Columbia Circuit affirmed the decision of the district court in all respects.<sup>3</sup> That court held that the Indian plaintiffs had not demonstrated that the governmental action in question burdens their religious beliefs or practices and, thus, that there was no free exercise infringement proven which would necessitate a judicial weighing of governmental interests against religious interests, or which would require a judicial inquiry into less intrusive alternatives.

Specifically, the court of appeals held that in order to demonstrate a burden on religion, and thereby invoke the protections of the free exercise clause, the plaintiffs must demonstrate either that the proposed government

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<sup>3</sup> The decisions of the courts below also included consideration of other issues besides AIRFA and the free exercise clause for which review is not sought in this petition. Some of those issues are raised in a petition for certiorari filed by Richard F. and Jean Wilson.

land use would "penalize adherence to religious belief" or "penalize[ ] the plaintiffs for their beliefs," 708 F.2d at 741-42, (App. "A", p. 12), or that such government land use "would impair a religious practice that could not be performed at any other site." *Id.* at 744. (App. "A", p. 16.) The court of appeals concluded that "[a]s the plaintiffs have not shown that development will burden them in their religious beliefs and practices, we need not decide whether the ski area expansion is a compelling governmental interest, or whether the Preferred Alternative is the least restrictive means of achieving that interest." *Id.* at 745. (App. "A", p. 19.)

The Indian plaintiffs' timely Petitions for Rehearing and for Rehearing *En Banc* were each denied by the court of appeals. *See* App. "G", pp. 147-151.

The Indian plaintiffs have not sought in this litigation to have the Peaks designated as an Indian religious shrine from which non-Indians would be barred. *Compare Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). Rather, plaintiffs have sought to have the defendants take either of the permissible, lawful alternatives identified in the EIS which would not adversely affect the Indian religious interests.

## REASONS AND ARGUMENT FOR GRANTING THE PETITION

### I.

THERE IS A NEED FOR THIS COURT TO  
ESTABLISH THAT ADHERENTS OF TRADI-  
TIONAL NATIVE AMERICAN RELIGIONS

ARE ENTITLED TO THE FULL PROTECTIONS OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The courts below in this case have cut off nearly 170,000 Hopi and Navajo Indians from the protections of the free exercise clause of the first amendment by finding that the claimed desecration of the Indians' most sacred religious beliefs and practices as the result of discretionary government action does not amount to a constitutionally implicated "burden" on the followers of those religions. The decisions of the courts below allow the Forest Service to sacrifice the traditional religious beliefs and practices of the Hopi and Navajo Indians, as well as the native cultures which are so closely tied to such traditional religious beliefs and practices, to the commercial development of a mediocre ski resort by a private permittee on National Forest lands. Significantly, by characterizing the effect on the Indian religions as something less than a "burden" in the constitutional sense, the courts below have allowed the disruptive private development to proceed without conducting a traditional balancing of interests test to determine whether some public interest outweighs the claimed need to preserve the Indian religions, and without identifying whether less intrusive alternatives could be employed to lessen the impact on the Indian religions. *Compare Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

The facts here, coupled with the large number of Indians affected and the two major Indian cultures at

stake, establish in this case a clear need for this Court to clarify whether or not adherents of traditional native American religions are entitled to the same kind and degree of protection under the free exercise clause of the first amendment, as are other American citizens in the beliefs and practices of other religions. Unless reviewed and corrected by this Court, the decisions of the courts below will stand as precedent to other courts that free exercise claims of American Indians should be subjected to a threshold standard of proof higher than that applied to the free exercise claims of any other religious group as a condition precedent to a traditional judicial weighing of interests and consideration of alternatives.

All of the Indian plaintiffs' evidence was to the effect that their religious beliefs and practices would in fact be significantly and fundamentally burdened by the expansion of the Snow Bowl which is in issue. It is the fact of such a real, proven burden on religion, and not its precise nature, which should have been held to trigger the protections of the free exercise clause. "For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'" *Sherbert v. Verner*, 374 U.S. at 404, quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961). See also *Thomas v. Review Board*, 450 U.S. at 717-18: "Where the state . . . [puts] substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists. While the compulsion may be indirect, the infringement upon free exercise is

nonetheless substantial." Once the desecration of the Peaks is allowed to occur, the Indians will necessarily have to modify their religious beliefs and practices which center therein.

Burdens on the free exercise of religion far less egregious than those at stake in this case have been recognized by this court as entitled to first amendment consideration and its required balancing of interest analysis. See *Bob Jones University v. United States*, 51 U.S.L.W. 4593, 4601 (U.S. May 24, 1983) (denial of tax benefits will have a substantial impact on operation of private religious school but will not prevent that school from observing its religious tenets; compelling governmental interest in reducing racial discrimination held to overbalance religious interest). See also *United States v. Lee*, 455 U.S. 252 (1982) (payment of social security taxes interferes with free exercise rights of Amish farmer and carpenter, yet does not destroy basis for religion; taxes required to be paid because of overriding government interest in maintaining the social security system). Compare *Thomas v. Review Board*, 450 U.S. 707 (1981) (denial of unemployment benefits to employee who refused to work on the Sabbath day held not justified by government need to maintain its benefit scheme). Petitioner submits that the burden on the Hopi religion and religious culture which this case threatens is identical in kind, but greater in degree, to that recognized as protected by the first amendment for the Amish people in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). See footnote 2 above.

These cited cases demonstrate that the inability of a religion either to survive doctrinally or to carry on religious practices despite a complained-of government infringement are not the criteria in other contexts for judging whether or not there is a "burden" on the free exercise of religion. The higher burden of proof imposed by the courts below in this case as a barrier to free exercise analysis for the plaintiff Indians represents both an improper allocation of the risk of an erroneous decision between religious freedoms and public land administration, and an improper indication that Indian religious interests are of lower relative importance than other religious interests. Compare *Addington v. Texas*, 441 U.S. 418, 423 (1979).<sup>4</sup> That approach is hardly consistent with what this Court has recognized as "[t]he overriding duty of our Federal Government to deal fairly with Indians wherever located," *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

Indeed, *United States v. Lee*, 455 U.S. 252 (1982), establishes that, except for bizarre or clearly non-religious claims, it is the religious adherents themselves, and not the courts, who should determine whether or not the practice of one's religion is burdened by government action.

It is not within "the judicial function and judicial competence," however, to determine whether ap-

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<sup>4</sup> And see Boothby, *Government Entanglement With Religion: What Degree of Proof is Required?*, 7 *Pepperdine L. Rev.* 613 (1980) (urging that in cases of government infringement on religious interests protected by the first amendment, the government should be required to prove by clear and convincing proof both that a compelling state interest exists and that the governmental action is the least intrusive alternative available).

pellee or the Government has the proper interpretation of the Amish faith; "[c]ourts are not arbiters of scriptural interpretation." [citing *Thomas*, 450 U.S. at 716.] We therefore accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights.

455 U.S. at 257.

Certainly the claimed desecration of a faith's central religious beliefs and practices would, for any other religion, implicate the free exercise clause and its balancing test. This Court needs to establish that no less protection should be afforded, and no higher burden of proof imposed, simply because the plaintiffs are American Indians and because the government action involves the administration of public lands.

## II.

### THIS COURT SHOULD CLARIFY WHETHER THE AMERICAN INDIAN RELIGIOUS FREE- DOM ACT MEANS WHAT IT SAYS.

In 1978, Congress enacted what is known as the American Indian Religious Freedom Act, codified in part at 42 U.S.C. § 1996 (Supp. V 1981). The entire Act is set forth above in the Statutory Provisions Involved section. The codified portion of that Act provides as follows:

On and after August 11, 1978, it shall be the policy of the United States to *protect and preserve*



for American Indians their inherent right of freedom to believe, express, *and exercise the traditional religions* of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to *access to sites, use and possession of sacred objects*, and the freedom to worship through *ceremonials and traditional rites*.

(Emphasis supplied.)

As AIRFA recognizes, and as the court of appeals acknowledged, 708 F.2d at 742, (App. "A", p. 13), Indian religions are frequently "site-specific."<sup>5</sup> As in the instant case, such sites are frequently on public lands and their use for Indian religious purposes frequently conflicts with otherwise lawful uses of such lands.<sup>6</sup>

Both of the courts below have construed AIRFA as doing nothing more than securing to Indians the same rights to the free exercise of religion enjoyed by other, more powerful religions in American society. See 708 F.2d at 745-47. (App. "A", pp. 19-23.) By construing AIRFA in such a way as to invite federal officials to merely consider, but not to "protect [or] preserve" In-

<sup>5</sup> Compare *Pillar of Fire v. Denver Urban Renewal Authority*, 181 Colo. 411, 509 P.2d 1250, 1254 (1973): "[R]eligious faith and tradition can invest certain structures and land sites with significance which deserves First Amendment protection."

<sup>6</sup> The Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528-531 (1976), does not mandate that National Forest lands be utilized contrary to the religious interests of Indians. Like AIRFA, 16 U.S.C. § 528 sets a "policy" for the government. In addition, the definition of "multiple-use" recognizes "that some land will be used for less than all of the resources . . . with consideration given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output." 16 U.S.C. § 531(a).



dian religious beliefs and practices as AIRFA expressly necessitates, the courts below have emasculated AIRFA.<sup>7</sup> Petitioner submits that as United States citizens (*see* 43 Stat. 253 (1924), now codified as part of 8 U.S.C. §1401 (1976)), American Indians were already entitled to the full range of first amendment protections enjoyed by other citizens vis-a-vis the actions of the federal government. *See generally* F. Cohen, *Handbook of Federal Indian Law*, 645 (1982 ed.). The interpretation of AIRFA given by the courts below thus renders AIRFA both meaningless and unnecessary. "There is a presumption against a construction which would render a statute ineffective." *United States v. Powers*, 307 U.S. 214, 217 (1939).

The proper construction of AIRFA should have been reached pursuant to the rule that "statutes passed for the benefit of dependent Indian Tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976), quoting from *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). The right of Indians to practice their site-specific and object-oriented religions should be recognized as what Congress has said it is, namely an "inherent right." The obliga-

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<sup>7</sup> Section 2 of Pub. L. No. 95-342, of which 42 U.S.C. § 1996 is section 1, instructed the President to direct the various federal departments to evaluate their policies and procedures in consultation with traditional native religious leaders and to determine and report to Congress any changes necessary to preserve Native American religious cultural rights and practices. *See the Constitutional and Statutory Provisions Involved* section, above. Thus, the consultation with Indian religious leaders which the defendants have undertaken in this case conforms to Section 2 of AIRFA, leaving Section 1 (i.e., 42 U.S.C. § 1996), uncomplished with.

tion of the federal defendants should be declared to be what Congress has said it shall be, namely to "protect and preserve" American Indian religious beliefs and practices. The "freedom to worship" at desecrated sites or with desecrated objects are hardly the kinds of rights Congress believed it was protecting for Native Americans when it passed AIRFA.<sup>8</sup>

This case demonstrates how meaningless AIRFA becomes when it is construed to require nothing more than Indian input into federal decision making regarding the use of federal lands. Petitioner and the other Indian plaintiffs claim that the development in question will, for example, "destroy[] the natural conditions necessary for the performance of ceremonies and the collection of religious objects," 708 F.2d at 742, (App. "A", p. 13), and that "[t]he destruction of these practices will also destroy our present way of life and culture." *Id.* at 741 n.2. (App. "A", p. 10.) The respondents' own EIS identified as possible, lawful alternatives either the removal of the recreational facilities or their maintenance in a status quo condition. The respondents and their

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<sup>8</sup> The protection of first amendment rights is a traditional function of the federal government. See *United States v. Reese*, 92 U.S. 214, 217 (1876):

Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.

The protection of American Indians is likewise a traditional function of the federal government. See e.g., *United States v. Mitchell*, 51 U.S.L.W. 4999 (U.S. June 27, 1983) ("general trust relationship between the United States and Indian people"); 25 U.S.C. §§ 1301-1341 (1976) (the Indian Civil Rights Act).

subordinates have, nevertheless, decided that instead of taking any action to "protect and preserve" such threatened Indian religions, they will approve, without modification or restriction, the expansion of a mediocre commercial ski resort serving only a very small proportion of the public, and potentially greatly benefiting one private commercial permittee. That project will cause the complained-of harm to the native religions and to the Indian cultures so largely predicated on those religions. Mere consideration of Indian input should not be allowed to stand as a substitute for either abiding the "policy" set by AIRFA, or conducting the analysis and consideration to which free exercise rights are entitled under this Court's decisions in *Yoder* and *Sherbert*.

If AIRFA was not intended to mean what it says concerning preservation and protection of Indian culture and religions, then this Court should put the issue to rest by definitively so declaring. If, however, AIRFA represents some meaningful exercise of Congress' authority to set federal policy, to control public lands, and to administer Indian affairs, then this Court should likewise so declare before irreparable harm is done to the religious beliefs and practices, and to the underlying culture, of the Hopi and Navajo Indians.

The problems typified by this case are common and recurring among Indian tribes generally. The religious interests at stake are among the most fundamental which our society recognizes. See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501 (1979); *Murdock v. Pennsylvania*, 319 U.S. 105, 109, 115 (1943). Where

as here, the religious beliefs and practices of two major Indian tribes are to be sacrificed to the expansion of a private recreational enterprise on federal land, further review by this Court is warranted.

### III.

#### THE DECISION BELOW CONFLICTS WITH THE MOST RECENT SUBSEQUENT FEDERAL COURT DECISION CONSIDERING NEARLY IDENTICAL FACTS.

In an opinion dated May 24, 1983, the United States District Court for the Northern District of California entered a decision on substantially identical facts to those in this case, but reaching the opposite result under the free exercise clause. *See Northwest Indian Cemetery Protective Association v. Peterson*, 565 F. Supp 586 (N.D. Cal. 1983).<sup>9</sup>

While that case, because of the recent date of its decision, has not yet resulted in a conflicting decision of the court of appeals, petitioner respectfully suggests that the opposite result reached therein on the free exercise issue demonstrates the need for clarification by this Court of the applicability of the first amendment's free

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<sup>9</sup> Other cases considering AIRFA and/or Indian free exercise rights have reached differing results on divergent bases. *See, e.g., Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981); *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir. 1980), cert. denied, 449 U.S. 953 (1980); *Inupiat Community of Arctic Slope v. United States*, 548 F.Supp. 182 (D. Alaska 1982); *Crow v. Gullet*, 541 F.Supp. 785 (D. So. Dak. 1982); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *Frank v. State*, 604 P.2d 1068 (Alaska 1979).

exercise clause to the religious beliefs and practices of American Indians on public lands.<sup>10</sup>

### CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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John Paul Kennedy

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Counsel for Petitioner

Dated: \_\_\_\_\_

[Appendix separately printed and filed.]

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<sup>10</sup> The need for this court to clarify the nature and extent of American Indian rights under the free exercise clause has been recognized in law review materials considering the issue. See Note, *Native American Free Exercise Rights to the Use of Public Lands*, 63 B. U. L. Rev. 141 (1983); Note, *Native Americans and the Free Exercise Clause*, 28 Hastings L.J. 1509 (1977).

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FILED

OCT 7 1983

ALEXANDER L. STEVAS,  
CLERK

No. ....

**In the Supreme Court of the  
United States**

OCTOBER TERM, 1983

HOPI INDIAN TRIBE,

*Petitioner,*

vs.

JOHN R. BLOCK, Secretary of Agriculture;  
NED D. BOYLEY, Acting Assistant Secretary of Agriculture for Natural Resources and Environment; R. MAX PETERSON, Chief Forester of the United States,  
*Respondents.*

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**APPENDIX**

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT**

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## **APPENDIX "A"**

Court of Appeals Opinion  
Dated May 20, 1983

### **United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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No. 81-1905

**RICHARD F. WILSON, ET AL., APPELLANTS**

**V.**

**JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.**

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No. 81-1912

**THE HOPI INDIAN TRIBE, APPELLANT**

**V.**

**JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.**

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No. 81-1956

**NAVAJO MEDICINEMEN'S  
ASSOCIATION, ET AL., APPELLANTS**

**V.**

**JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.**

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No. 82-1705

NAVAJO MEDICINEMEN'S  
ASSOCIATION, ET AL., APPELLANTS

V.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

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No. 82-1706

THE HOPI INDIAN TRIBE, APPELLANT

V.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

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No. 82-1725

RICHARD F. WILSON and JEAN WILSON,  
husband and wife, APPELLANTS

V.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

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Appeals from the United States District Court  
for the District of Columbia

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(D.C. Civil Action Nos. 81-00558, 81-00481 & 81-00493)

Argued October 15, 1982

Decided May 20, 1983

*John Paul Kennedy*, with whom *David B. Lee* was on the brief, for Hopi Indian Tribe, appellant in 81-1912 and 82-1706. *C. Benson Hufford*, also entered an appearance for appellant, in 81-1912. *Richard M. Hymas*, also entered an appearance for appellant in 82-1705, 82-1706 and 82-1725.

*John A. MacKinnon*, with whom *Elizabeth Bernstein* and *C. Benson Hufford* were on the brief, for Navajo Medicinemen's Association, et al., appellants in 81-1956 and 82-1705. *Daniel S. Press*, also entered an appearance for appellants in 81-1956. *C. Benson Hufford*, also entered an appearance for appellants in 82-1725.

*Charles R. Work*, with whom *Robert W. Warden*, *Douglas J. Wall*, *John A. Hodges*, and *Robert A. Warden*, were on the brief, for *Richard F. Wilson* and *Jean Wilson*, appellants in 81-1905 and 82-1725, and *amici curiae* in 81-1912, 81-1956 and 82-1706.

*Jacques B. Gelin*, Attorney, Department of Justice, with whom *Patricia J. Beneke* and *Robert L. Klarquist*, Attorneys, Department of Justice, were on the brief, for appellees. *Robert D. Clark*, Attorney, Department of Justice, also entered an appearance for appellees in 81-1905, 81-1912 and 81-1956.

*Richard McCune Shannon* and *Stephen P. Kling* were on the brief for appellee, Northland Recreation Inc.

*Ellen Leitzer* was on the brief, for Eastern Bank of Cherokee Indians, et al., *amici curiae* urging reversal in 81-1905, 81-1912 and 81-1956.

Before: TAMM and GINSBURG, *Circuit Judges*, and LUMBARD,\* *Senior Circuit Judge*, United States Court of Appeals for the Second Circuit.

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\*Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the Court filed by *Senior Circuit Judge LUMBARD*.

**LUMBARD, Circuit Judge:** These appeals challenge the grant of summary judgment by the District Court for the District of Columbia which affirmed the decisions of the Forest Service and the Department of Agriculture to permit private interests to expand and develop the government-owned Snow Bowl ski area on the San Francisco Peaks in the Coconino National Forest just north of Flagstaff, Arizona. The appeals are brought by the Hopi Indian Tribe, the Navajo Medicinemen's Association and other Navajos, and Richard F. Wilson, et al. each of whom filed separate suits which were consolidated for trial by Judge Richey. We affirm.

The Navajo and Hopi Indian tribes are federally recognized tribes of American Indians. The Hopi reservation and most of the Navajo reservation are located in northeastern Arizona and encompass a total area of 25,000 square miles. Approximately 9,000 Hopis and 160,000 Navajos reside on the reservations.

The dominant geological formation visible from the Hopi villages and much of the western Navajo reservation is the San Francisco Peaks. The Peaks, which rise to a height of 12,633 feet, have for centuries played a central role in the religions of the two tribes. The Navajos believe that the Peaks are one of the four sacred mountains which mark the boundaries of their homeland. They believe the Peaks to be the home of specific deities and consider the Peaks to be the body of a spiritual being or god, with various peaks forming the head, shoulders, and knees of a body reclining and facing to the east, while the trees, plants, rocks, and earth form the skin. The Navajos pray directly to the Peaks and regard them as a living deity. The Peaks are invoked in religious ceremonies to heal the Navajo people. The Navajos collect herbs from the Peaks for use in religious ceremonies, and perform ceremonies upon the Peaks.

They believe that artificial development of the Peaks would impair the Peaks' healing power.

The Hopis believe that the Creator uses emissaries to assist in communicating with mankind. The emissaries are spiritual beings and are generally referred to by the Hopis as "Kachinas." The Hopis believe that for about six months each year, commencing in late July or early August and extending through mid-winter, the Kachinas reside at the Peaks. During the remaining six months of the year the Kachinas travel to the Hopi villages and participate in various religious ceremonies and practices. The Hopis believe that the Kachinas' activities on the Peaks create the rain and snow storms that sustain the villages. The Hopis have many shrines on the Peaks and collect herbs, plants and animals from the Peaks for use in religious ceremonies. The Hopis believe that use of the Peaks for commercial purposes would constitute a direct affront to the Kachinas and to the Creator.

The San Francisco Peaks are within the Coconino National Forest and are managed by the Forest Service. A 777 acre portion of the Peaks, known as the "Snow Bowl," has been used for downhill skiing since 1937 when the Forest Service built a road and ski lodge. The lodge was destroyed by fire in 1952 and was replaced in 1956. Ski lifts were built at the Snow Bowl in 1958 and 1962. Since 1962 the facilities have changed very little.

In April 1977 the Forest Service transferred the permit to operate the Snow Bowl skiing facilities from Summit Properties, Inc. to the Northland Recreation Company. In July 1977 Northland submitted to the Forest Service a "master plan" for the future development of the Snow Bowl, which contemplated the construction of additional parking and ski slopes, new lodge facilities, and ski lifts. The Forest Service, pursuant to the National Environmental Policy Act, conducted public workshops and solicited alternatives to Northland's plan. The Forest

Service evaluated the proposed alternatives and identified six which were feasible and represented the spectrum of public opinion. These alternatives ranged from complete elimination of artificial structures in the Snow Bowl to full development as proposed by Northland. On June 23, 1978 the Forest Service filed a draft Environmental Impact Statement evaluating the six alternatives. Between June 23 and September 30, 1978 the Forest Service solicited public opinion on the draft Environmental Impact Statement. Special efforts were made to solicit the views of the Hopis and Navajos.

On February 27, 1979 the Forest Supervisor of the Coconino National Forest issued his decision to permit moderate development of the Snow Bowl under a "Preferred Alternative," which in fact was not one of the six alternatives previously identified. The Preferred Alternative envisions the clearing of 50 acres of forest for new ski runs, instead of the 120 acres requested by Northland. The Preferred Alternative also authorized construction of a new day lodge, improvement of restroom facilities, reconstruction of existing chair lifts, construction of three new lifts, and the paving and widening of the Snow Bowl road.

At the request of various persons, including certain of the plaintiffs, the Regional Forester on February 7, 1980 overruled the Forest Supervisor and ordered maintenance of the status quo. The Chief Forester on December 31, 1980 reversed the Regional Forester and reinstated the Forest Supervisor's approval of the Preferred Alternative.

On March 2, 1981, the Navajo Medicinemen's Association filed suit in the District Court for the District of Columbia, naming as defendants John R. Block, Secretary of Agriculture; R. Max Peterson, Chief Forester of the Forest Service; the Forest Service; and the United States. The complaint sought a halt to further development of the Snow Bowl and the removal of existing ski facilities. This suit was consolidated with similar suits brought by the Hopi tribe and Jean and Richard

Wilson, owners of a ranch located a mile and a half below the Snow Bowl.

The plaintiffs alleged that expansion of the Snow Bowl facilities would violate the Indians' First Amendment right to the free exercise of religion, the American Indian Religious Freedom Act, the fiduciary duties owed the Indians by the government, the Endangered Species Act, two statutes regulating private use of national forest land (16 U.S.C. §§ 497, 551), the National Historic Preservation Act, the Multiple-Use Sustained Yield Act, the Wilderness Act, the National Environmental Policy Act, and the Administrative Procedure Act.

Pursuant to expedited procedures agreed to by all the parties, numerous affidavits were submitted together with a Joint Stipulation of Material Facts. The parties filed cross-motions for summary judgment. While these motions were pending the district court on May 27, 1981 permitted Northland to intervene as a defendant. After a hearing, Judge Richey on June 15, 1981 granted summary judgment to the defendants on all issues except the plaintiffs' claim under the National Historic Preservation Act. Finding that the Forest Service had failed to comply with certain requirements of that Act, Judge Richey remanded the cause to the Forest Service for further proceedings and stayed development until compliance. After the defendants reported back, Judge Richey on May 14, 1982 ruled that the Forest Service had achieved compliance and he entered final judgment for the defendants on all issues and vacated his stay. These appeals followed promptly and the defendants have agreed to delay development pending their disposition.

From our review of the record we are convinced that Judge Richey's conclusions of law are in accordance with precedent and not in error. Accordingly, we affirm the judgments. Our opinion considers in detail the claims raised by the plaintiffs under the following constitutional provisions and statutes: the Free Exercise Clause, the American Indian Religious Free-

dom Act, the Establishment Clause, the Endangered Species Act, the Wilderness Act, the National Historic Preservation Act, and 16 U.S.C. §§ 497, 551.

# 1. *Free Exercise of Religion.*

Religious freedom is guaranteed by the First Amendment, which states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Navajo and Hopi plaintiffs contend that development of the Snow Bowl is inconsistent with their First Amendment right freely to hold and practice their religious beliefs.<sup>1</sup> Believing the San Francisco Peaks to be sacred, they feel that development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes. They contend that development would seriously impair their ability to pray and conduct ceremonies upon the Peaks, and to gather from the Peaks the sacred objects, such as fir boughs and eaglets, which are necessary to their religious practices. As relief, the Navajos and Hopis seek a phased removal of all artificial structures on the Peaks, or, at the least, an injunction against further development of the Snow Bowl. Judge Richey, although he recognized the sincerity of the plaintiffs' beliefs, held that a First Amendment claim had not been stated. He found that the government had not denied the Indians access to the Peaks or impaired their ability to gather sacred objects and conduct ceremonies, and thus had not burdened their beliefs or religious practices. We agree with Judge Richey that the plaintiffs have not shown an impermissible burden on religion.

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<sup>1</sup>Judge Richey properly ruled that Jean and Richard Wilson, who are not Indians, did not have standing to assert the Navajo and Hopi religious claims. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). We have, however, considered the Wilsons' briefs on the religious claims as briefs of *amicus curiae*.



To be protected by the Free Exercise Clause of the First Amendment, a belief or practice must be "rooted in religion." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 713 (1981). The parties have stipulated that the plaintiffs' beliefs are religious and are sincerely held, and the record contains abundant evidence supporting that stipulation. We therefore proceed directly to apply the Free Exercise Clause to the plaintiffs' claims and the proof before us.

The Free Exercise Clause proscribes government action that burdens religious beliefs or practices, unless the challenged action serves a compelling governmental interest that cannot be achieved in a less restrictive manner. *See, e.g., Badoni v. Higginson*, 638 F.2d 172, 176-77 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), *Barnett v. Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969). The initial burden of proof in free exercise cases is upon the plaintiff to demonstrate a burden upon religion. *See School Dist. of Abington v. Schempp*, 374 U.S. 203, 223 (1963). Only if a burden is proven does it become necessary to consider whether the governmental interest served is compelling, or whether the government has adopted the least burdensome method of achieving its goal. In analyzing the plaintiff's contentions that the ski resort expansion will burden their religions, we consider separately the effects of development upon their beliefs and upon their religious practices.

The plaintiffs stress that development of the Snow Bowl for a ski resort is grossly inconsistent with their beliefs. The Hopis and the Navajos believe that they owe a duty to the deities to maintain the San Francisco Peaks in their natural state. They believe that breach of that duty will lead to serious adverse consequences for their peoples. Navajo and Hopi religious practitioners are deeply troubled by the development that



has already occurred upon the Peaks, and expansion of the Snow Bowl will increase their disquiet.<sup>2</sup>

The First Amendment right to hold religious beliefs is absolute. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Free Exercise Clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). Notwithstanding the plaintiffs' concerns, it is clear that the government has not regulated, prohibited, or rewarded their religious beliefs as such, nor has it in any manner directly burdened the plaintiffs in their beliefs. The Free Exercise Clause, however, also proscribes certain *indirect* burdens on belief. Arguing that an impermissible indirect burden has been imposed, the plaintiffs direct our attention to *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board of the Indiana Employment Sec. Div.*, 450 U.S. 707 (1981).

In *Sherbert*, the plaintiff, a Seventh-Day Adventist, was discharged by her employer because she refused to work on Saturday, the Sabbath Day of her faith. The South Carolina Employment Security Commission refused the plaintiff's application for unemployment benefits, finding that her religious convictions did not constitute "good cause" for refusing available work. The South Carolina Supreme Court upheld the

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<sup>2</sup>The plaintiffs claim that further development of the Snow Bowl could have a serious and adverse impact upon their tribes' cultures and social organization. Abbott Sekaquaptewa, then-chairman of the Hopi tribe, stated in "Narrative Direct Testimony" submitted to the district court:

It is my opinion that in the long run if the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, our people will not accept the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people. If our people no longer possess this long-held belief and way of life, which will inevitably occur with the continued presence of the ski resort . . . a direct and negative impact upon our religious practices [will result]. The destruction of these practices will also destroy our present way of life and culture.

Commission's determination. The Supreme Court reversed. The fact that no criminal sanctions compelled the plaintiff to violate her beliefs, said the Court, did not end the free exercise inquiry. Instead, held the Court, the government burdens the free exercise of religion when it conditions receipt of a government benefit, such as unemployment compensation, on conduct inconsistent with the recipient's religious beliefs. In *Thomas*, the plaintiff, a Jehovah's Witness, quit his job at a factory producing tank turrets because he believed armaments production to be inconsistent with his faith. The Indiana Supreme Court held that the plaintiff's decision to quit employment because of his religious convictions did not constitute "good cause" and denied him unemployment benefits. The Supreme Court reversed, holding, as it did in *Sherbert*, that the government burdens free exercise when it forces an individual to choose between a government benefit and fidelity to religious belief. The Court stated:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

450 U.S. at 717-18.

*Sherbert* and *Thomas* are not factually analogous to the present case. The government here has not conditioned any benefit upon conduct proscribed or mandated by the plaintiffs' beliefs. Acknowledging this factual distinction, the plaintiffs read *Sherbert* and *Thomas* broadly as condemning under the Free Exercise Clause governmental actions which strongly, if indirectly, encourage religious practitioners to modify their beliefs. Specifically, the plaintiffs argue that governmental

actions which "desecrate and destroy the spiritual character of a religion's most sacred shrine" and which may thereby force practitioners "to fundamentally modify their religious doctrine to conform to the changed circumstance" create free exercise burdens under *Sherbert* and *Thomas*. We disagree. *Sherbert* and *Thomas* hold only that the government may not, by conditioning benefits, penalize adherence to religious belief. Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion. The Secretary of Agriculture has a statutory duty, *see, e.g.*, 16 U.S.C. §§ 471, 528 (1976) to manage the National Forests in the public interest, and he has determined that the public interest would best be served by expansion of the Snow Bowl ski area. In making that determination, the Secretary has not directly or indirectly penalized the plaintiffs for their beliefs. The construction approved by the Secretary is, indeed, inconsistent with the plaintiffs' beliefs, and will cause the plaintiffs spiritual disquiet, but such consequences do not state a free exercise claim under *Sherbert*, *Thomas*, or any other authority.<sup>3</sup> In sum, the plaintiffs have not shown that expansion of the Snow Bowl will burden their freedom to believe. A separate question, to which we now turn, is whether expansion will burden the plaintiffs in the practice of their religions.

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<sup>3</sup>*Pillar of Fire v. Denver Urban Renewal Authority*, 181 Colo. 411, 509 P.2d 1250 (1973), is not to the contrary. In *Pillar of Fire*, the plaintiff church sought to enjoin the condemnation by an urban renewal project of its first permanent church building. The plaintiff alleged that its members revered the building for its historical and symbolic meaning in the birth of their sect. The Colorado Supreme Court held that the plaintiff was entitled to a court hearing at which its interests could be weighed against those of the renewal authority. "(R)eligious faith and tradition," said the court, "can invest certain structures and land sites with significance which deserves First Amendment protection." 181 Colo. at 419, 509 P.2d at 1254. A governmental taking of privately-owned religious property, however, involves different considerations than does a claimed First Amendment right to restrict the government's use of its own land.

The plaintiffs must have access to the San Francisco Peaks to practice their religions. Certain of the plaintiffs' ceremonies must be performed upon the Peaks and religious objects must be collected there. Because the plaintiffs' religions are, in this sense, site specific, development of the Peaks would severely impair the practice of the religions if it destroyed the natural conditions necessary for the performance of ceremonies and the collection of religious objects. The plaintiffs claim that the Preferred Alternative will impair their religious practices in precisely that manner. Few courts have considered whether the Free Exercise Clause prohibits the government from permitting land uses that impair specific religious practices. Of the cases which have considered this problem, we find *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980), to be particularly instructive.

In *Sequoyah*, a class action brought on behalf of practitioners of the Cherokee religion, the plaintiffs sought to halt construction of the Tellico Dam on the Little Tennessee River. The plaintiffs alleged that the dam, when completed, would flood the Cherokee "sacred homeland" along the river, and would destroy "sacred sites, medicine gathering sites, holy places and cemeteries," and "disturb the sacred balance of the land." 620 F-2d at 1160. The Sixth Circuit affirmed a grant of summary judgment to the defendant, ruling that the plaintiffs, to establish a burden of free exercise, had to prove that the valley to be flooded was indispensable or central to their ceremonies and practices. The plaintiffs' proof was insufficient, held the court, as the evidence indicated that medicines obtainable in the valley could be obtained elsewhere, and that the flooding would not prevent the plaintiffs from engaging in any particular religious observances.<sup>4</sup>

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<sup>4</sup>Four cases in addition to *Sequoyah* have considered free exercise claims seeking to restrict development of government land. In *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954

Judge Richey relied upon the *Sequoyah* analysis in the present case, and held that the plaintiffs had failed to show the indispensability of the Snow Bowl to the practice of their religions. The plaintiffs challenge Judge Richey's reliance upon *Sequoyah* on two grounds. They argue first that *Sherbert* and *Thomas*, and not *Sequoyah*, establish the standard applicable to

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(1981), Navajo religious practitioners believed that the Rainbow natural bridge, a great arch of sandstone located in the Rainbow Bridge National Monument in Utah, was sacred. They complained that a government reservoir which had partially inundated the bridge had covered some of their gods and prayer sites, and that the noisy tourists who visited the bridge desecrated the site and made ceremonies impractical. As relief, the plaintiffs requested the court to order the government to lower the reservoir, to issue regulations controlling tourist behavior, and on appropriate notice, to close the monument to tourists so that ceremonies could be conducted. The Tenth Circuit affirmed a district court decision denying relief. The Tenth Circuit held that the government had a compelling interest in filling the reservoir that outweighed any First Amendment right the plaintiffs might assert, and that closing the Monument, or restricting tourist behavior, to accommodate the plaintiffs' beliefs would violate the Establishment Clause. Ruling as it did, the Tenth Circuit never considered in detail whether the Free Exercise Clause can create a right to restrict government land use. The decision in *Badoni* therefore offers little guidance here. In *Crow v. Gullet*, 541 F.Supp. 785 (D.S.D. 1982), a class action on behalf of the Lakota and Tsistsistas nations, and Lakota and Tsistsistas religious practitioners, the plaintiffs objected to certain construction projects and park regulations at the Bear Butte State Park in South Dakota. The plaintiffs alleged, *inter alia*, that Bear Butte was a significant site in their religions that would be desecrated by the access roads, parking lot, and viewing platforms that the state had built or was planning to build. The district court denied relief, holding that "the free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out." 541 F. Supp. at 791. It is uncertain, however, whether the court believed that the Free Exercise Clause can *never* restrict government land use, since the court specifically noted that the plaintiffs had "failed to establish that particular religious practices were damaged by the construction." *Id.* In *Inupiat Community of Arctic Slope v. United States*, 548 F. Supp. 182, 188-89 (D. Alaska 1982), the Inupiat people of Alaska brought suit to quiet title to portions of the Beaufort and Chukchi Seas in which the United States had issued oil leases. The plaintiffs claimed, *inter alia*, that development would burden their right freely to practice their religion. The court

to their claim. They contend that governmental action which indirectly imposes a burden upon religious practice greater than the burdens involved in *Sherbert* and *Thomas* necessarily violates the First Amendment. Contending that the Snow Bowl ski area effectively prohibits the practice of their religions, the plaintiffs claim that their burden is greater than that of the practitioners in *Sherbert* and *Thomas*, who, the plaintiffs say, could have continued to practice their beliefs simply by choosing to forego government benefits. However, as we previously stated, *Sherbert* and *Thomas* considered only whether the government may legally condition benefits on a decision to forego or to adhere to religious belief or practice. Those cases did not purport to create a benchmark against which to test all indirect burden claims. Second, the plaintiffs argue that *Sequoyah* incorrectly interpreted the First Amendment. They argue that the First Amendment protects all religious practices, whether or not "central," and that courts are not competent to rule upon the centrality of religious belief or practice. We agree that the First Amendment protection of religion "does not turn on the theological importance of the disputed activity." *Unitarian Church West v. McConnell*, 337 F. Supp. 1252, 1257 (E.D. Wis. 1972), *affd.*, 474 F.2d 1351 (7th Cir. 1973), *vacated and remanded on other grounds*, 416 U.S. 932 (1974) and that courts may not "dictate which practices are or are not required in a particular religion." *Geller v. Secretary of Defense*, 423 F. Supp. 16, 17 (D.D.C. 1976). See *Thomas*, 450 U.S. at 715-16;

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rejected the plaintiffs' claim, finding that the plaintiffs had failed to show impairment of their religious practices, that the government had a compelling interest in developing energy resources, and that the Establishment Clause in any event barred relief. Finally, in *Northwest Indian Cemetery Protective Assoc. v. Peterson*, 552 F. Supp. 951 (N.D. Calif. 1982), the plaintiffs, claiming that their religious activities would be disrupted, sought to enjoin the Forest Service from approving construction of a road upon land sacred to several Northwest Indian tribes. The court held for the defendants, and stated that the First Amendment does not obligate the government "to control or limit public access to public lands in order to facilitate" religious practices. 552 F. Supp. at 954.



*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-20 (1976). These principles, however, are not contrary to *Sequoyah's* analysis. Far from requiring judicial evaluation of religious doctrine, *Sequoyah* focuses inquiry solely upon the importance of the geographic site in question to the practice of the plaintiffs' religion. If the plaintiffs cannot demonstrate that the government land at issue is indispensable to some religious practice, whether or not central to their religion, they have not justified a First Amendment claim. We agree with *Sequoyah's* resolution of the conflict between the government's property rights and duties of public management, and a plaintiff's constitutional right freely to practice his religion. We thus hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site.<sup>5</sup>

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<sup>5</sup>We do not hold that such proof necessarily would establish a burden on free exercise. Instead, we hold only that the First Amendment requires, at a minimum, proof that the religious practice could not be performed at any site other than that to be developed. Because we agree with Judge Richey that the plaintiffs have not satisfied this minimum burden of proof, we need not consider what, if any, additional factors are necessary to establish a free exercise burden. At the same time, we decline to follow those cases which have placed primary reliance upon the government's property interest and which have held, apparently, that the Free Exercise Clause can never supersede the government's ownership rights and duties of public management. See *Crow v. Gullet*, 541 F. Supp. 785, 791 (D.S.D. 1982); *Northwest Indian Protective Cemetery Assoc. v. Peterson*, 552 F. Supp. 951, 954 (N.D. Calif. 1982). The government must manage its land in accordance with the constitution, *Badoni v. Higginson*, 638 F.2d 172, 176 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981); *Sequoyah v. TVA*, 620 F.2d 1159, 1164 (6th Cir. 1980), cert. denied, 449 U.S. 935 (1980), which nowhere suggests that the Free Exercise Clause is inapplicable to government land. This is not to say that the government's property rights, and its duty to manage its land for the public benefit, have no bearing upon the free exercise analysis. In holding that government land uses can never burden the right to freedom of belief, and can burden the right to freedom of practice only if site-specific religious practices are

The plaintiffs argue that their proof establishes a denial of First Amendment rights even under the above standard. They rely principally upon the affidavits submitted by Hopi and Navajo religious practitioners, which establish that ceremonies conducted upon the Peaks are indispensable to the plaintiffs' religions; that ceremonial objects must be collected from the Peaks to be effective; that some ceremonial objects and medicinal herbs are collected from the Snow Bowl, and that expansion of the ski area could make those objects and herbs more difficult to find; that ceremonies and prayers have occasionally been conducted in the Snow Bowl, but that expansion of the ski area will destroy the natural conditions necessary for prayers and ceremonies to be effective; and that the mountain as a whole, and not just parts thereof, is considered sacred.

The plaintiffs' affidavits, together with other evidence in the record, establish the indispensability of the Peaks to the practice of the plaintiffs' religions. The Forest Service, however, has not denied the plaintiffs access to the Peaks, but instead permits them free entry onto the Peaks and does not interfere with their ceremonies or the collection of ceremonial objects. At the same time, the evidence does not show the indispensability of that small portion of the Peaks encompassed by the Snow Bowl permit area. The plaintiffs have not proven that expansion of the ski area will prevent them from performing ceremonies or collecting objects that can be performed or collected in the Snow Bowl but nowhere else. The record evidence is, in fact, to the contrary. The Forest Service's Final Environmental Statement found, on the basis of comments submitted by Hopi and Navajo practitioners, that "religious practices, including collecting plant materials, may occur in many locations on the sacred mountain." The government submitted affidavits from two experts on Hopi and Navajo religion. One expert stated

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significantly impaired, we pay due regard to the government's rights and duties in its land. However, we see no basis for completely exempting government land use from the Free Exercise Clause.



that expansion of the Snow Bowl should have little "direct" impact on the plaintiffs' religious practices; the other stated with respect to Hopi practices that "(g)uarantee of access to the mountain should permit the continuation of all essential ritual practices," and with respect to Navajo practices that "(n)o ceremonial items . . . are found only in the permit area." It must be remembered that the Snow Bowl permit area comprises only 777 of the 75,000 acres of the Peaks, and that prior construction on the Peaks has not prevented the plaintiffs from practicing their religions.<sup>6</sup> Judge Richey found that "the Snow Bowl operation has been in existence for nearly fifty years and it appears that plaintiffs' religious practices and beliefs have managed to coexist with the diverse developments that have occurred there." (footnote omitted). The plaintiffs simply have not demonstrated that development will prevent them from engaging in any religious practices.<sup>7</sup>

<sup>6</sup> Among the structures currently on the Peaks are natural gas, telephone, and electric transmission lines, water tanks for stock, unpaved roads, and the present Snow Bowl ski resort. Cinder extraction and mining have been conducted on the Peaks for at least the past 30 years.

<sup>7</sup> The plaintiffs urge that Judge Richey erred in granting the defendants summary judgment because material issues of fact were in dispute. They argue that when Judge Richey granted summary judgment the parties still disputed the effect development would have upon the plaintiffs' religions. We conclude, however, that in light of the case's procedural posture judgment was properly granted. On May 20, 1981, the parties filed with the district court a Joint Stipulation of Material Facts (supplemented on June 1, 1981). Although the stipulated facts did not dispose of one crucial factual issue—the indispensability of the permit area to the practice of the plaintiffs' religions—they did establish many of the principal facts underlying the plaintiffs' claim. The parties supplemented the stipulated facts with numerous affidavits concerning the religious significance of the Snow Bowl. The parties filed with their affidavits cross-motions for summary judgment which were argued before Judge Richey. When Judge Richey asked counsel for the Hopis whether the plaintiffs had "any reservations about the Court deciding this on the merits by virtue of stipulation and the affidavits," he replied, "Not at all, Your Honor." We thus find that the plaintiffs agreed to the disposition

As the plaintiffs have not shown that development will burden them in their religious beliefs or practices, we need not decide whether the ski area expansion is a compelling governmental interest, or whether the Preferred Alternative is the least restrictive means of achieving that interest.

## 2. *American Indian Religious Freedom Act.*

The American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. IV 1980) (AIRFA), provides:

On and after August 11, 1978 it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The plaintiffs contend that AIRFA proscribes all federal land uses that conflict or interfere with traditional Indian religious beliefs or practices, unless such uses are justified by compelling

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of this claim on the written record. As the Ninth Circuit stated in *Gillespie v. Norris*, 231 F.2d 881, 883-84 (9th Cir. 1956):

Now, while summary judgment cannot be granted where there are questions of fact to be disposed of, even by consent of all concerned, there is no reason why parties cannot agree to try a case upon affidavits, admissions and agreed documents. In effect, that is what was done here. No objection whatever was made at the time of submission that there were questions of fact which could not be decided upon the evidence before the trial court.

*Accord, Starsky v. Williams*, 512 F.2d 109, 111-13 (9th Cir. 1975). Upon his review of the written record, Judge Richey found that the plaintiffs had not "shown that the permit area of the San Francisco Peaks is central or indispensable to their religion." This finding is not clearly erroneous and, indeed, is not significantly refuted by any evidence in record. We must emphasize that evidence that all of San Francisco Peaks, including the Snow Bowl, is sacred, does not establish the indispensability of the permit area.

governmental interests. They argue that the Snow Bowl ski resort expansion is not a compelling governmental interest, and is accordingly proscribed by AIRFA. Judge Richey refused to give AIRFA the broad reading urged by plaintiffs. He found that AIRFA requires federal agencies to evaluate their policies and procedures with the aim of protecting Indian religious freedom, to refrain from prohibiting access, possession and use of religious objects and the performance of religious ceremonies, and to consult with Indian organizations in regard to proposed actions, but that AIRFA does not require "Native traditional religious considerations always [to] prevail to the exclusion of all else." We agree. Judge Richey's interpretation of AIRFA<sup>8</sup> is fully supported by the legislative history, and the record supports his finding of Forest Service compliance.

AIRFA affirms the protection and preservation of traditional Indian religions as a policy of the United States, but the statutory language does not indicate the extent to which Congress intended that policy to override other land use considerations. We therefore look for guidance to the legislative history, and, in particular, to the substantially identical committee reports prepared by the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs. These reports reveal that in AIRFA Congress addressed the unwarranted and often unintended intrusions upon Indian religious practices resulting from federal officials' ignorance and the inflexible enforcement of laws and regulations which, though intended to achieve valid secular goals, had directly affected Indian religious practices. The reports identify three areas of concern: (1) denial of access to religious sites; (2) restrictions on the possession of such substances as peyote; and

<sup>8</sup>Judge Richey's decision marked the first judicial interpretation of AIRFA. Courts in only two other circuits have since construed AIRFA, and both followed Judge Richey's interpretation. *Northwest Indian Cemetery Protective Assoc. v. Peterson*, 552 F. Supp. 951, 954 (N.D. Calif. 1982); *Crow v. Gullett*, 541 F. Supp. 785, 793-94 (D.S.D. 1982).

(3) actual interference with religious events. The federal government, the reports note, had sometimes denied Indians access to religious sites on federal land; had failed to accommodate such federal statutes as the drug and endangered species laws to the Indians' religious needs, and had itself interfered, or permitted others to interfere, with religious observances. See S. Rep. No. 709, 95th Cong., 2d Sess. 2-4; H.R. Rep. No. 1308, 95th Cong., 2d Sess. 2-3, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1262, 1263-64. Thus, the House Report stated that the purpose of AIRFA is "to insure that the policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion." H.R. Rep. No. 1308, *supra*, at 1, 1978 U.S. Code Cong. & Ad. News at 1262.

It is clear from the reports, and from the statutory preamble, that AIRFA requires federal agencies to learn about, and to avoid unnecessary interference with, traditional Indian religious practices. Agencies must evaluate their policies and procedures in light of the Act's purpose, and ordinarily should consult Indian leaders before approving a project likely to affect religious practices. AIRFA does not, however, declare the protection of Indian religious practitioners a veto on agency action. "The clear intent of [AIRFA]," the Senate report states, "is to insure for traditional native religions the same rights of free exercise enjoyed by more powerful religions. However, it is in no way intended to provide Indian religions with a more favorable status than other religions, only to insure that the U.S. Government treats them equally." S. Rep. No. 709, *supra*, at 6. The comments made during debate by Representative Udall of Arizona, the chairman of the Interior and Insular Affairs Committee and the sponsor of the House bill, similarly indicate that AIFA does not supersede the many

laws under which federal lands are managed for the public good. Representative Udall stated:

Mr. Speaker, it is not the intent of my bill to wipe out laws passed for the benefit of the general public or to confer special religious rights on Indians.

\* \* \* \*

Mr. Speaker, I have received a letter from Assistant Attorney General Patricia M. Wald which . . . states that it is the Department's understanding that this resolution, in and of itself, does not change any existing State or Federal law. That, of course, is the committee's understanding and intent.

124 Cong. Rec. 21,444 (1978).

All this simple little resolution says to the Forest Service, to the Park Service, to the managers of public lands is that if there is a place where Indians traditionally congregate to hold one of their rites and ceremonies, let them come on unless there is some overriding reason why they should not.

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(The resolution) simply says to our managers of public lands that they ought to be encouraged to use these places. It has no teeth in it. It is the sense of the Congress.

*Id.* at 21,445.

Thus AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values. It does not prohibit agencies from adopting all land uses that conflict with traditional Indian religious beliefs or practices. Instead, an agency undertaking a land use project will be in compliance with AIRFA if in the decision-making process, it obtains and considers the views of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices. This court's recent decision in *New Mexico*

*Navajo Ranchers Assoc. v. ICC*, (D.C. Cir. Slip Op. March 1, 1983) (per curiam), indicates that agencies will not be permitted to ignore their AIRFA duties. There, this court remanded for further consideration the ICC's approval of a rail line to be built across northwestern New Mexico because the ICC had failed properly to consider, *inter alia*, evidence that the railroad permittee would not fulfill its promise to protect Navajo sacred sites along the right-of-way.

Finally, we find that the Forest Service complied with AIRFA in the present case. Before approving the Preferred Alternative the Forest Service held many meetings with Indian religious practitioners and conducted public hearings on the Hopi and Navajo reservations at which practitioners testified. The views there expressed were discussed at length in the Final Environmental Statement and were given due consideration in the evaluation of the alternative development schemes proposed for the Snow Bowl. Development of the Snow Bowl under the Preferred Alternative will not deny the plaintiffs access to the Peaks, nor will it prevent them from collecting religious objects. The Forest Service has not burdened the plaintiffs' religious practices in any manner prohibited by AIRFA.

### 3. *Establishment Clause.*

Judge Richey held that to grant the plaintiffs the relief they request would violate the Establishment Clause of the First Amendment. We think it unnecessary to reach that issue. As neither the Free Exercise Clause nor AIRFA entitles the plaintiffs to relief, we have no reason to consider whether relief is barred by a separate constitutional provision. We note, moreover, that where governmental action violates the Free Exercise Clause, the Establishment Clause ordinarily does not bar judicial relief. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 & 234 n.22 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).



#### 4. *Endangered Species Act.*

The plaintiffs claim that the Forest Service violated section 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536 (a)(2) (Supp. IV. 1980), by failing to insure that the Preferred Alternative will not be likely to jeopardize the continued existence on the Peaks of a small yellow-flowered plant called *senecio franciscanus*, or the "San Francisco Peaks groundsel." *Senecio franciscanus* exists only in an elongated area of approximately 2.6 square kilometers at the top of the Peaks. This elongated area extends into the Snow Bowl permit area. As an alpine plant, *senecio franciscanus* is particularly susceptible to damage from human activity. The plant's population, once reduced by human activity, would not recover for decades or even centuries. The approved development will extend into a small portion of the plant's habitat and will destroy a small number of the plants. The greatest threat to the plant's continued existence, however, is posed not by construction, or by skiers, but by summer hikers who walk off-trail and trample the fragile plants. Expansion of the ski lifts will significantly increase the threat to the plant by allowing a greater number of hikers to reach its habitat.

On June 16, 1976 the Secretary of the Interior proposed *senecio franciscanus* for formal listing as an endangered species under section 4 of the Endangered Species Act of 1973, 16 U.S.C. § 1533. Section 4 requires the Secretary to publish in the Federal Register a list of those species determined by him or by the Secretary of Commerce to be endangered or threatened within the meaning of the Act. The Endangered Species Act amendments of 1978 required the withdrawal of all listing proposals over two years old. A one year grace period was extended to proposals already over two years old. On December 10, 1979 the Secretary withdrew the proposal to list *senecio franciscanus* because no action had been taken on the proposal since its submission. At the time the plaintiffs commenced this suit *senecio franciscanus* was neither listed nor proposed for listing.

Section 7(a)(2) of the Endangered Species Act requires each federal agency, with the assistance of the Secretary, to insure that its actions are not likely to jeopardize the continued existence of any endangered or threatened species. Section 7(a)(2) provides:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Section 7(a)(2) requires an agency, prior to project implementation, formally to consult the Secretary about any agency action that might affect a protected species. Section 7(b), 16 U.S.C. § 1536(b), requires the Secretary to provide to an agency that consults him under section 7(a)(2) a written opinion indicating how the agency's proposed action would affect the protected species and identifying means of protecting the species. The Forest Service has not formally consulted the Secretary about *senecio franciscanus*, and it has not obtained the written opinion required by section 7(b). The plaintiffs' claim would therefore have merit if section 7(a)(2) in fact protected *senecio franciscanus*. We, however, agree with Judge Richey, who held that § 7(a)(2) applies only to species listed pursuant to section 4, and hence had no application to the unlisted *senecio franciscanus*.

To support their argument that § 7(a)(2) protects all endangered or threatened species, whether or not listed, the plaintiffs make four principal points. First, they point out that § 7(a)(2) refers to "any endangered species or threatened



species," (emphasis supplied), and does not, unlike many other sections of Act, *see, e.g.*, §§ 7(a)(1), (c)(1), 16 U.S.C. §§ 1536 (a)(1), (c)(1), specifically refer to species which are "listed" or "proposed to be listed." Second, they note that § 7a(2)'s reference to "endangered . . . or threatened species" does not incorporate a listing requirement because the statutory definitions of "endangered species" and "threatened species" do not mention listing.<sup>9</sup> Third, they draw attention to the difference between the 1973 and the 1978 versions of section 7. As enacted in 1973, section 7 in a single clause required federal agencies to carry out "programs for the conservation of *endangered species and threatened species listed pursuant to section 1533*" and to insure that agency actions did not jeopardize the continued existence "of *such* endangered species and threatened species." (emphasis supplied). The 1978 amendments to the Endangered Species Act divided that clause into two sentences. In the first sentence Congress again required agencies to conduct programs for the preservation of "listed" species, and in the second sentence again required agencies to insure the continued existence of endangered and threatened species. However, the amended section 7, in contrast to the original, did not, in restricting agency action, directly or indirectly refer to "listed" species. Instead, the 1978 amendments changed the word "such" in the original statute to "any" and required agencies to insure the existence of "any endangered species or threatened species." Finally, the plaintiffs note that in 1979 both houses of Congress considered proposed amendments to the Act which, *inter alia*, would have added an explicit listing requirement to § 7(a)(2). *See S. 1143, 96th Cong., 1st Sess. § 6(a) (1979), 125 Cong.*

<sup>9</sup> 16 U.S.C. § 1532(6) defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range other than [certain insects]." 16 U.S.C. § 1536(20) defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

Rec. S7557 (daily ed. October 24, 1979). Although Congress did amend the Endangered Species Act in 1979, it did not amend § 7(a)(2) to include a specific listing requirement.

The plaintiffs claim that their points prove that Congress intended the 1978 amendments to extend § 7 protection to unlisted species.<sup>10</sup> The legislative history, however, strongly indicates that Congress had no such intent. In its report on the 1978 amendments, the House Committee on Merchant Marine and Fisheries stated:

The protections provided to animal and plant species threatened with extinction are activated by the listing of a species as "endangered" or "threatened."

H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 9453, 9455. The House report further states: "The mandate of section 7 applies once a species is listed." *Id.*, at 7, 1978 U.S. Code Cong. & Ad. News at 9458. These statements, it is true, are contained in a section of the committee report that summarizes the operation of the 1973 Act, and thus are not direct evidence of Congress' intent regarding the 1978 amendments. That portion of the committee report which does discuss the effect of the 1978 amendments, *see Id.* at 19-25, 1978 U.S. Code Cong. & Ad. News at 9469-75, however, contains no indication that in amending section 7 Congress intended to broaden its coverage to protect species not protected by the 1973 Act. Instead, Congress principally

<sup>10</sup>The plaintiffs' final point—Congress' failure in 1979 to amend § 7(a)(2) to refer specifically to listed or proposed species—adds little to their argument. Congress in 1979 clearly believed that § 7(a)(2) applied only to listed species. *See the discussion infra.* Thus the proposed amendments to § 7(a)(2) were intended not to add a listing requirement, but to extend § 7 protection, for the first time, to species only *proposed* for listing. Although Congress did not amend § 7(a)(2) in this respect, it did protect proposed species by adding § 7(a)(3) to the Act. *See H.R. Cong. Rep. No. 697, 96th Cong., 1st Sess. 13, reprinted in* 1979 U.S. Code Cong. & Ad. News 2572, 2576.

intended in amending section 7 to define procedures that would facilitate agency compliance with the section and to establish a mechanism by which agencies could, in appropriate cases, be exempted from the section. Comments made in connection with the 1979 amendments are also significant. The Committee on Merchant Marine and Fisheries states in its report on the 1979 amendments: "The mandate of section 7 applies once a species is listed or once 'critical habitat' is designated for any listed species." H.R. Rep. No. 167, 96th Cong., 1st Sess. 5, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2557, 2561 (1979). The House Conference Report on the amendments states:

The conferees note that the purpose of a listing proposal is to determine whether a species is endangered or threatened and should be listed as such. The protections of Section 7 should not apply until a species has been formally listed.

H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 13, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2572, 2577. We are aware that subsequent legislative history is not controlling evidence of the intent underlying previously enacted legislation. See *Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). Nonetheless, we think that the 1979 committee and conference reports are entitled to significant weight in interpreting the effect of the 1978 amendment of section 7. Those reports were close in time to the 1978 amendments, and their interpretation of amended section 7 is consistent with the view apparent from the 1978 House report.

The structure of the Endangered Species Act confirms that § 7(a)(2) applies only to listed species. Of particular significance is the central role played by the Secretary of the Interior in the administration of the Act.<sup>11</sup> Section 4 requires

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<sup>11</sup>The Secretary of Commerce also has significant duties under the Act. Here, however, we are concerned only with the duties of the Secretary of the Interior.

the Secretary to determine by regulation which species are endangered or threatened, to publish a list of such species, and periodically to review the list for necessary changes. Section 5, 16 U.S.C. § 1534, authorized the Secretary to acquire land for the protection of listed species and other plants and wildlife. Section 6, 16 U.S.C. § 1535, authorizes the Secretary to enter into agreements with the states to achieve the purposes of the Act. Section 7(b), as previously noted, requires the Secretary to advise agencies that consult him under § 7(a)(2) on means of protecting covered species. These provisions show that under the Act the Secretary has primary responsibility to research the status of different species, to list those species that are in need of protection, and to act for the preservation of listed species. Thus it would be anomalous to construe § 7(a)(2) as requiring each federal agency, regardless of its inexpertise in matters of environmental protection or wildlife conservation, to decide for itself whether any of the species its proposed action would affect is endangered or threatened. It is more logical to conclude that § 7(a)(2) requires an agency, in consultation with the Secretary, to assess the impact of proposed agency action upon a listed species and to develop plans for the species' protection.<sup>12</sup>

We also note that the plaintiffs' interpretation of § 7(a)(2) would make a nullity of § 7(a)(3), 16 U.S.C. § 1536(a)(3), which requires each agency to consult the Secretary "on any

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<sup>12</sup>The plaintiffs claim that individual federal agencies are qualified to decide whether the species their actions will affect are endangered or threatened. They rely upon that provision of § 7(a)(2) which states: "In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available." That language, the plaintiffs argue, requires agencies to use the best available data to determine species status. We think it clear, however, that the quoted language serves only partially to define the nature of an agency's duties once a listed species has brought § 7(a)(2) into play.

agency action which is likely to jeopardize the continued existence of any species proposed to be listed." Section 7(d), 16 U.S.C. 1536(d), prohibits an agency, pending the completion of a § 7(a)(2) consultation about a listed species, from making any "irretrievable commitment of resources" which would foreclose the formulation or implementation of any reasonable alternative for species protection that the Secretary might suggest under § 7(b). In contrast, § 7(a)(3), concerning proposed species, explicitly states that the consultation it requires does not include the § 7(d) limitation on the commitment of resources. The plaintiffs, however, would extend § 7(a)(2) protection, including the § 7(d) limitation, to all vulnerable species, whether or not listed or proposed for listing. They would thus extend to species not proposed for listing greater protection than § 7(a)(3) grants to proposed species. The plaintiffs' interpretation would make irrelevant the protection afforded by § 7(a)(3) and would violate the basic rule of statutory construction that courts should, if possible, give effect to every word used by Congress. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 242 (D.C. Cir. 1981). For these reasons we conclude that to be protected under § 7(a)(2) a species must be listed under § 4.

The plaintiffs claim that if listing is required under § 7(a)(2), we should treat *senecio franciscanus* as if it were listed. They rely upon the Forest Service's recognition in the Final Environmental Statement that the Preferred Alternative threatens the plant, and upon the fact that the Fish and Wildlife Service, since at least 1976, has been aware of the plant's vulnerability. They contend that the Secretary's failure formally to list the plant since 1976 constitutes unreasonable delay and a violation of the statutory mandate "to halt and reverse the trend towards species extinction, whatever the cost." *TVA v. Hill*, 437 U.S. 153, 184 (1978). We agree with Judge Richey

that there is no evidence of such bad faith or unreasonable conduct on the part of the Secretary as would warrant an injunction against the United State ordering the listing of *senecio franciscanus*.

On November 22, 1982, approximately one month after we heard argument, the Secretary, through the Fish and Wildlife Service, proposed *senecio franciscanus* for listing as a threatened species. 47 Fed. Reg. 52,483 (1982). Because *senecio franciscanus* is now proposed for listing, § 7(a)(3) (discussed above) requires the Forest Service to consult the Secretary about the possible impact of the Preferred Alternative upon the plant. We do not think it necessary to remand this case to the district court to insure Forest Service compliance with § 7(a)(3). Section 7(a)(3) does not incorporate the § 7(d) limitation on commitment of resources and thus does not prohibit development until consultation is completed. More important, we have no reason to believe that the Forest Service has not, or will not, comply with § 7(a)(3). The record indicates that appropriate measures can be taken to minimize the danger to *senecio franciscanus*. We are confident that the Forest Service will, in good faith, implement such measures.

#### 5. *Wilderness Act.*

On May 2, 1979 President Carter, on the advice of the Secretary of Agriculture, recommended to Congress that it designate as wilderness under the National Wilderness Preservation System Act of 1964, 16 U.S.C. §§ 1131-36 (1976), some 14,650 acres of the San Francisco Peaks. Congress has not yet acted upon that recommendation. The area recommended for wilderness designation abuts the Snow Bowl permit area on the north, south, and east, but includes no part of the permit area. A substantial part of the permit area is still undeveloped; in particular, a strip of land approximately 500 feet wide along the area's northern border, adjacent to the recommended wilderness area, remains heavily forested. Under the



Preferred Alternative that strip of land will be partially developed for skiing. The plaintiffs contend that the Secretary of Agriculture, in approving development of pristine land adjacent to a recommended wilderness area, infringed Congress' exclusive authority to determine wilderness area boundaries. The plaintiffs base their claim upon § 3(b) of the Wilderness Act, 16 U.S.C. § 1132(b) (1976), and argue that the Secretary may not, by authorizing expansion of the ski area, impair Congress' discretion to include undeveloped portions of the Snow Bowl in the San Francisco Peaks wilderness area. As Judge Richey found, the plaintiffs' claim is without merit.

Section 1132(b) authorized the President to recommend for inclusion in designated wilderness areas lands contiguous to areas formerly designated as "primitive" by the Secretary of Agriculture. It provides:

The Secretary of Agriculture shall, within ten years after September 3, 1964, review, as to its suitability or unsuitability for preservation as wilderness, each area in the national forests classified on September 3, 1964 by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed . . . Each recommendation of the President for designation as "wilderness" shall become effective only if so provided by an Act of Congress . . . Any [primitive] area may be increased in size by the President at the time he submits his recommendations to the Congress by not more than five thousand acres with no more than one thousand two hundred and eighty acres of such increase in any one compact unit; if it is proposed to increase the size of any such area by more than five thousand acres or by more than one thousand two

hundred and eighty acres in any one compact unit the increase in size shall not become effective until acted upon by Congress. *Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value.*

(emphasis supplied).

In *Parker v. United States*, 448 F.2d 793, 797 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), the Tenth Circuit held that the italicized language reflects "the clear intent of Congress . . . that both the President and the Congress shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation." A "meaningful opportunity" can be preserved only if lands within the ambit of § 1132(b) remain undeveloped until such time as the President and Congress act. Thus in *Parker*, the Tenth Circuit affirmed a district court order enjoining the Secretary from authorizing lumbering of certain virgin land contiguous to a primitive area, where the President and Congress had not yet considered whether to designate the land in question as wilderness.

*Parker* indicates that § 1132(b) can restrict the Secretary's discretion to approve development of wilderness land contiguous to a designated primitive area. The defendants, however, contend that § 1132(b) does not apply to national forest land which is neither contained in nor contiguous to a primitive area, and that the plaintiffs' claim must therefore fail, as neither the Snow Bowl permit area nor any other part of the San Francisco Peaks has ever been designated primitive. We agree.

The clear focus of the statutory language is upon the Secretary's duties with respect to primitive areas. A brief review of



the statute's background confirms that the statute has no broader application. In 1929 the Secretary of Agriculture, by regulation, established procedures for the designation of primitive areas in national forests. The 1929 regulation was superseded in 1939 by new regulations which authorized the Secretary of Agriculture to designate wilderness areas in excess of 100,000 acres and the Chief of the Forest Service to designate wild areas of between 5,000 and 100,000 acres. The Secretary of Agriculture then reviewed the 73 primitive areas designated between 1929 and 1939 to determine which should be designated in whole or in part as wilderness or wild areas. By 1964, when Congress considered legislation to create a statutory scheme for the protection of wilderness lands, 18 tracts of national forest land had been designated as wilderness areas, 35 as wild areas, and 34 remained in their original classification as primitive areas. See H.R. Rep. No. 1538, 88th Cong., 2d Sess. 7-8, *reprinted in* 1964 U.S. Code, & Ad. News, 3615, 3616.<sup>13</sup> Congress concluded that the areas designated as wilderness or wild areas had been "defined with precision," *Id.* at 3617, and could be given statutory protection immediately. Accordingly, in § 3(a) of the Wilderness Act, 16 U.S.C. § 1132 (a), Congress designated as wilderness all areas within the national forests that the Secretary of Agriculture had classified at least 30 days before September 3, 1964 as wilderness or wild. Congress believed, however, that the primitive areas had not been "defined with precision," and that such areas "should not be considered for inclusion in the wilderness system until completion of a thorough review." *Id.* Accordingly, in § 3(b) of the Act, 16 U.S.C. R 1132(b), Congress ordered the Secretary of Agriculture to review each designated primitive area as to its suitability for inclusion in the wilderness system. It thus is clear from § 1132(b)'s limited purpose that the statute applies only to primitive areas and lands contiguous thereto.

<sup>13</sup>Also, one area had been designated as "canoe." *Id.*

Since the Snow Bowl permit area is neither contained in nor contiguous to any primitive area, the plaintiffs have no claim under § 1132(b).<sup>14</sup>

#### 6. *National Historic Preservation Act.*

In his June 15, 1981 opinion, Judge Richey found that the Forest Service had committed three violations of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.* (1976), and implementing regulations. First, he found that the Forest Service had not, as required by 16 U.S.C. § 470f and Executive Order 11593,<sup>15</sup> examined the project area to identify properties eligible for inclusion in the National Register of Historic Places. *See* 16 U.S.C. § 470a. Second, he found that the Forest Service had not, as required by 36 C.F.R. § 800.4 (b), consulted the Arizona State Historic Preservation Officer (SHPO) about the effect of the Preferred Alternative upon two National Register properties near the Snow Bowl—the Fern Mountain Ranch, owned by plaintiffs Jean and Richard Wilson, and the C. Hart Merriam Base Camp. Finally, he found that

<sup>14</sup> Additionally, § 1132(b) applies only to forest land “predominantly of wilderness value.” 16 U.S.C. § 1131(c) defines “wilderness” as “an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation . . . with the imprint of man’s work substantially unnoticeable . . .” The permit area certainly is not wilderness under that definition. As Judge Richey noted, the permit area contains a ski lodge and ski runs and has been partially cleared of trees. The fact that portions of the permit area remain undeveloped cannot change the fact that the area is not “predominantly of wilderness value.” We therefore would reject the plaintiffs’ § 1132(b) claim even were the statute otherwise applicable. The plaintiffs’ reliance upon *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970), *affd.*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), is misplaced. Not only was the land at issue in that case contiguous to a designated primitive area, it also contained no development other than a short access road.

<sup>15</sup> Executive Order 11593 is reprinted in 16 U.S.C.A. § 470 (1974) at 26, and at 36 F.R. 8921 (1971).

the Forest Service had not, as required by 36 C.F.R. § 800.4 (a)(1), consulted the SHPO about the eligibility of the San Francisco Peaks themselves for inclusion in the National Register. Judge Richey remanded the case to the Forest Service for compliance with NHPA, and stayed development pending compliance. Upon remand, the Forest Service conducted archaeological surveys of the permit area and consulted the SHPO. On September 22, 1981, the Chief Forester determined that the project area contained no properties either listed or eligible for listing on the National Register; that expansion of the ski area would not affect the historic qualities of the Merriam Base Camp or the Fern Mountain Ranch; and that the San Francisco Peaks themselves were not eligible for listing. The SHPO had concurred in these findings by letter dated September 11, 1981. After the plaintiffs failed to obtain administrative reversal of the Chief Forester's determination, the defendants returned to court to show compliance to Judge Richey. On May 14, 1982 Judge Richey ruled that the Forest Service had complied with NHPA in all respects. He granted the defendants final judgment on all counts and lifted the stay against development.

The plaintiffs claim that Judge Richey erred in finding compliance with NHPA. They contend that the Forest Service's efforts to identify eligible properties in the permit area were legally insufficient; that the Preferred Alternative will affect the historic qualities of the Fern Mountain Ranch;<sup>16</sup> and that the San Francisco Peaks are eligible for listing. The plaintiffs' three contentions will be considered in order.

16 U.S.C. § 470f and implementing regulations, see 36 C.F.R. § 800.4(a), together with Executive Order 11593, require federal agencies approving land use projects to identify all properties within and about the project area that are eligible for

<sup>16</sup>The plaintiffs have on appeal dropped their claim that development will impair the historic qualities of the C. Hart Merriam Base Camp.

listing in the National Register and that may be affected by the project. See *Romero-Barcelo v. Brown*, 643 F.2d 835, 859 (1st Cir. 1981), *reversed on other grounds*, 102 S.C. 1798 (1982). The specific area to be examined for eligible properties is the "area of the undertaking's potential environmental impact," 36 C.F.R. § 800.4(a), which is defined as the "geographical area within which direct and indirect effects generated by the undertaking could reasonably be expected to occur." 36 C.F.R. § 800.3(o). The agency must consult the SHPO when determining the area of potential environmental impact and the scope of surveys needed to identify eligible properties within that area. 36 C.F.R. §§ 800.3(o), 800.4(a)(1), (2). The Forest Service and the SHPO agreed that the Preferred Alternative's area of potential environmental impact included the 777 acre permit area, the Snow Bowl road, and 30-foot strips of land on both sides of the road. Forest Service and Northern Arizona University archaeologists in July, 1981 conducted archaeological surveys in which they intensively examined 272 acres, or 35% of the total permit area, including all 77 acres proposed for development under the Preferred Alternative. The surveys revealed no evidence of Navajo or Hopi use and in fact discovered only one archaeological site—the formation of the old Snow Bowl ski lodge that burned in 1952. The Forest Service found the lodge foundation to be ineligible for listing, and the plaintiffs do not argue to the contrary. The SHPO agreed that the surveys satisfied the Forest Service's affirmative obligation to locate and identify eligible properties in the impact area. See 36 C.F.R. § 800.4(a)(2).

The plaintiffs argue that the Forest Service breached its NHPA duty to identify *all* eligible properties by failing to survey 100% of the impact area. They contend that the Forest Service's partial surveys may have left some eligible properties undetected. We think that the partial surveys were sufficient. The regulations do not expressly require agencies in all cases completely to survey impact areas, and in fact recognize that

the need for surveys will vary from case to case. See C.F.R. §§ 800.4(a)(1), (2). We believe that a complete survey is not required where both the partial survey, and all other evidence, indicate that a complete survey would be fruitless. Here, the defendants' surveys discovered neither eligible properties nor any evidence to suggest that such properties might be present in areas not surveyed. The existing literature on the San Francisco Peaks gave the Forest Service no indication of historical or archaeological sites in the impact area. Additionally, the high altitude and steep slopes of the San Francisco Peaks made the impact area an unlikely site for past human habitation and hence an unlikely place in which to find eligible properties. Under these circumstances a complete survey was not required. We find support for our conclusion in the First Circuit's decision in *Romero-Barcelo*, *supra*, where the Navy conducted a partial archaeological survey of the island of Vieques off the Puerto Rican coast in connection with training operations there to be conducted. The Navy's survey identified numerous eligible properties and suggested the probable existence of other archaeological sites not specifically located. The First Circuit held that § 470f and Executive Order 11593 required the Navy to conduct further surveys to locate the sites thought to be present. Significantly, however, the court stated that its decision did not require the Navy "to undertake a 100% survey of Vieques," or to survey parts of the island where the initial survey established "archeological sterility." 643 F.2d at 860.

As a second ground for reversal, the plaintiffs argue that the Forest Service erred in finding that the Preferred Alternative will have no effect upon the historic qualities of the Fern Mountain Ranch. Section 800.4(b) of 36 C.F.R. requires each agency, in consultation with the SHPO, to determine for each listed or eligible property within the potential environmental impact area, whether the agency project will affect the historical, archaeological, or other characteristic of the property that

qualified it for inclusion in the National Register. The agency is to determine whether an effect is present according to the criteria of 36 C.F.R. § 800.3. If the agency determines that the project will have no effect, the project may proceed. 36 C.F.R. § 800.4(b)(1). If, however, the agency determines merely that the project will have no *adverse* effect, the agency's determination must be submitted to the Advisory Council on Historic Preservation for review and comment, 36 C.F.R. § 800.4(c), and if the agency determines that there will be an adverse effect, the agency must formally consult the Council. 36 C.F.R. §§ 800.4(d), 800.6(b). The plaintiffs argue that Judge Richey erred in failing to require formal consultation under § 800.6(b). We conclude, however, that Judge Richey properly upheld the Forest Service's finding of "no effect."

The Fern Mountain Ranch is located on the western slopes of the San Francisco Peaks, approximately one and one-half miles to the north of the Snow Bowl. The Ranch provides an excellent view of the Peaks' wooded slopes, and of the permit area. Development under the Preferred Alternative will somewhat impair the Ranch's rustic setting since the new ski lifts and slopes will be readily visible from the Ranch. The plaintiffs argue that alteration of the Ranch's natural setting would constitute an "adverse effect" under the regulations. They rely upon 36 C.F.R. § 800.3(b), which defines "adverse effect" as including, *inter alia*, an "alteration of the property's surrounding environment," or the "(i)ntroduction of visual . . . or atmospheric elements that are out of character with the property." The plaintiffs' argument fails to recognize that the § 800.3 criteria are to be applied with reference only to those characteristics of the property that qualified it for National Register listing. See 36 C.F.R. § 800.4(b). The Ranch's natural setting is not one of the characteristics that qualified it for listing. Instead, the Nomination Form for the Ranch's listing indicates that the Ranch is historically significant for three reasons:



(1) its original nineteenth-century buildings are still standing and in use; (2) it played an important role, as a rest stop, in the development of the Grand Canyon as a tourist attraction; and (3) it was the first ranch in Arizona to raise Arabian horses. Clearly, the Preferred Alternative will not affect the Ranch's three relevant characteristics and its effect upon the view from the Ranch is, under the circumstances, immaterial. The plaintiffs also argue that the Preferred Alternative will adversely effect the Ranch because the increased tourist traffic at the Snow Bowl will, they say, increase the dangers of trespassing, vandalism, and arson at the Ranch. The Forest Service, however, determined that increased use of the Snow Bowl would not endanger the Ranch. The Forest Service's determination of this factual issue is adequately supported.

The plaintiffs also argue that the Forest Service violated NHPA by finding that the San Francisco Peaks themselves were not eligible for listing. The plaintiffs rely upon the fact that several other mountains and properties which are historically significant principally because of their association with Indian religion or culture have been listed. Those properties, however, may or may not have possessed the particular attributes of the San Francisco Peaks. The determination in each case of a property's eligibility is the responsibility of the agency and of the SHPO, *see* C.F.R. § 800.4(a)(3), and in the absence of an abuse of discretion, their application of the regulations to the facts must be sustained. We agree with Judge Richey that the plaintiffs have not shown an abuse of discretion.

Lastly, the plaintiffs argue that the Forest Service should have requested a final determination of the Peaks' eligibility from the Secretary of the Interior. Section 800.4(a)(3) of 36 C.F.R. states that when a "question" exists as to a property's eligibility, the Secretary shall be requested to make a final determination. Section 63.2(c) of 36 C.F.R. states that a "question" exists "when the agency and the State Historic

Preservation Officer disagree or when the agency determines that a question exists." Here, the Forest Service and the SHPO agreed that the Peaks were not eligible, and the Forest Service did not otherwise determine that a question existed. The plaintiffs' argument that a question existed because the Forest Service and the SHPO relied upon different reasoning in reaching their identical conclusion has no merit. Section 800.4(a)(3), as clarified by § 63.2(c), is obviously intended not to require the agency and the SHPO to reason alike, but only to resolve disputes between the two, and to provide a means by which the Secretary can have the final say on properties of uncertain status.

#### 7. *Land Use Permits.*

In 1977 the Forest Service issued two permits to Northland for use of the Snow Bowl permit area, which on May 18, 1982 were amended to reflect the development approved under the Preferred Alternative. One of the amended permits, covering 24 acres, is a term permit valid until May 1, 1997. The Forest Service granted this permit under the Act of March 4, 1915, as amended, 16 U.S.C. § 497 (1976), which provides:

The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; . . .

Northland will build the ski lodge and all other permanent facilities upon the land covered by the term permit. The other permit, an annual or revocable permit covering the



remaining 753 acres of the permit area, was issued by the Forest Service under the authority of the Act of June 4, 1897, as amended, 16 U.S.C. § 551 (1976), which authorizes the Secretary of Agriculture to "make such rules and regulations . . . as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." The land covered by the revocable permit will be used only for ski slopes.

The plaintiffs challenge the validity of the "dual permit" system employed by the Forest Service. They contend that 16 U.S.C. § 497, which authorizes permit areas no larger than 80 acres, constitutes the sole authority under which the Secretary may grant permits for the private recreational development of national forest lands. They accordingly claim that the Forest Service exceeded its authority in issuing a revocable permit under 16 U.S.C. § 551 and in granting permits covering 777 acres to a single developer. We agree with Judge Richey that § 497 does not limit the Secretary's authority under § 551 and that Congress has sanctioned the use of dual permits.

In 1905 Congress transferred the management of the national forests from the Secretary of the Interior to the Secretary of Agriculture. Act Feb. 1, 1905, c. 288, § 1, 33 Stat. 628. As early as May 31, 1905 the Attorney General informed the Secretary of Agriculture that the Act of 1897, as amended, authorized him to grant revocable permits for the private, commercial use of national forest land. 25 Op. Atty. Gen. 470 (1905). The Secretary of Agriculture thereafter routinely granted revocable permits for many purposes, including summer houses and camping grounds, under the 1897 Act. In 1911 the Supreme Court upheld the authority of the Secretary to grant revocable grazing permits under the Act. *United States v. Grimaud*, 220 U.S. 506 (1911).

In 1915 Congress enacted legislation, now § 497, which, in contrast to the Act of 1897, expressly authorized the Secretary of Agriculture to grant private permits to national forest land. The 1915 Act authorized the Secretary to grant term permits to areas not larger than five acres for periods not exceeding 30 years. The plaintiffs claim that the 1915 Congress intended to repeal whatever permit authority the Secretary possessed under the 1897 Act. The plaintiffs' argument has no support in the legislative history, which instead suggests that Congress acted not to repeal the Secretary's existing powers, but to enable him, for the first time, to grant long-term permits. The Congress recognized that the permanent structures necessary for recreational use of the national forests would not be built unless private parties could obtain secure tenure. Congressman Hawley, the sponsor of the House bill, stated:

At present the people have an unlimited right to go upon the public land in the national forests. They can go there and build a temporary camp, put up a tent or a little camp of some kind. They are given now by the Secretary of Agriculture permission to construct temporary structures. But it does not enable them to put up any important building, or to justify any considerable expenditure. But if they could get permission for a period of years they can afford to put up a better building(.)

52 Cong. Rec. 1787 (1915). Significantly, the Congress had before it a letter from the Secretary of Agriculture which discussed the Secretary's practice of granting revocable permits under the 1897 Act.<sup>17</sup> The letter stated:

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<sup>17</sup>The letter was both included in the House committee report, H.R. Rep. No. 1023, 63d Cong., 2d Sess. 2 (1915), and read during debate by Congressman Hawley. 52 Cong. Rec. 1787 (1915).

There is at the present time some hesitancy on the part of persons who want to use national-forest land upon which to construct summer residences, hotels, stores, and other structures involving a large expenditure, because of *the indefinite tenure of the permits to them which the present law provides for*. At the present time, however, *there are several thousand such permits in use*, upon which structures have been erected. In justice to those who desire to construct more substantial improvements, it is believed that the present law should be amended to give persons a better right than the *revocable permit now authorized*.

(emphasis supplied). We must therefore presume that when Congress acted in 1915 it had knowledge of the Secretary's practice under the 1897 Act. Accordingly, the absence in the Act and in the legislative history of any language expressly repudiating the Secretary's practice is strong evidence that Congress did not intend the 1915 Act to affect the Secretary's power to issue revocable permits. Certainly the plaintiffs have shown no reason to depart from the settled Rule disfavoring repeal by implication. See *Watt v. Alaska*, 451 U.S. 259, 267 (1981).

We conclude, therefore, that the 1915 Act neither limited the Secretary's power to issue revocable permits to areas larger than five acres nor prohibited him from issuing revocable and term permits simultaneously. Our conclusion is reinforced by Congress' awareness of, but failure to repudiate, the continuing practice of the Forest Service after 1915 to issue revocable permits under the 1897 Act. The Forest Service, following the 1915 Act, believed that the purposes of the Act could not be achieved unless it had authority to issue term permits to areas larger than five acres. Congress in the 1930's and 1940's considered several bills that would have expanded the Forest Service's authority to grant term permits, but enacted none of

them. These bills are nonetheless significant because the reports they generated gave Congress clear notice that the Forest Service was continuing to issue revocable permits for recreational uses, and further, was issuing dual permits. For example, the Senate report on S. 773 (72nd Cong., 1st Sess. (1932)), contains a letter from the Secretary of Agriculture to the Chairman of the Committee on Agriculture and Forestry, which states:

The general laws relating to the national forests do not authorize the issuance of permits *other than terminable at the discretion of the Secretary of Agriculture*. One act, that of March 4, 1915 . . . authorizes the issuance of permits for not to exceed 30 years and for areas of not to exceed 5 acres . . . Experience has proved that 5 acres is insufficient to permit of the proper development of the most modern types of outdoor camps, hotels, resorts, sanitoria, etc., which, in addition to the principal structures, usually require the related use of lands for the various necessary utilities, recreational services, etc., now regarded as essential to such services. *At present these are provided by the issuance of supplemental terminable permits*, which inject an undesirable element of uncertainty of tenure and add to routine requirements of administration.

S. Rep. No. 754, 72d Cong., 1st Sess. 2 (1932) (emphasis supplied). Similarly, in connection with H.R. 1809 (80th Cong., 1st Sess. (1948)), the Acting Secretary of Agriculture sent the Chairman of the Committee on Agriculture a letter, which stated:

Of course, the large majority of . . . permitted uses [in the national forests] are of relatively short duration or entail only small capital investments. In such circumstances *the type of terminable permit, renewable from year to year, which this Department is authorized to issue without limitation as a character of use or area, is adequate*.

H.R. Rep. No. 805, 80th Cong., 1st Sess. 2 (1948) (emphasis supplied).<sup>18</sup>

In 1956 Congress finally amended the 1915 Act to grant the Secretary broader power to issue term permits. The amendment increased the acreage limitation in § 497 from five acres to 80 because effective recreational development of the national forests had been stymied by the five-acre limitation on term permits. See H.R. Rep. No. 2792, 84th Cong., 2d Sess., *reprinted in* 1956 U.S. Code Cong. & Ad. News 3634. The committee reports, far from repudiating the Secretary's practice of issuing revocable permits, expressly approved the practice:

The Department of Agriculture now has adequate authority to issue revocable permits for *all* purposes under the act of June 4, 1897 (16 U.S.C. § 551). Its authority to issue term permits . . . would be broadened by S. 2216(.)

S. Rep. No. 2511, 84th Cong., 2d Sess. 1, (emphasis supplied), *quoted in* H.R. Rep. No. 2792, *supra*, at 2, 1956 U.S. Code Cong. & Ad. News at 3635. Congress has not amended either § 497 or § 551 in relevant part since 1956.

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<sup>18</sup>H.R. 1809, as originally proposed, would have authorized the Secretary to grant term permits to areas not larger than 80 acres for periods not exceeding 30 years in all of the national forests. The House Committee on Agriculture amended the bill to apply only to Alaskan national forests, because it believed that broadening the Secretary's powers as to other national forests might have undesirable results. See H.R. Rep. No. 805, 80th Cong., 1st Sess. 1 (1948). The bill passed as amended, 16 U.S.C. § 497a (1976). The plaintiffs argue that the amendment to H.R. 1809 reflects Congress' intent not to allow the Secretary to issue permits to large areas in the lower 48 states. The better interpretation, however, is that Congress was not yet ready to authorize the Secretary to grant *term* permits to areas larger than 5 acres. The legislative history of H.R. 1809 nowhere disapproves of the Secretary's practice of issuing dual permits and revocable permits to areas larger than 5 acres. As the quoted letter illustrates, Congress knew of that practice.

We conclude, then, that the Secretary has consistently interpreted the Act of 1915 as *not* limiting his authority to issue revocable permits under the Act of 1897; that Congress has for decades had knowledge of the Secretary's interpretation, but has never objected; and that on the one occasion when Congress did not comment on the Secretary's interpretation and practice, in 1956, it expressed approval. Under these circumstances the Secretary's authority to issue revocable permits under § 551, whether or not exercised in connection with dual permits, cannot be doubted. As this court stated in *Kay v. FCC*, 443 F.2d 638, 646-47 (1970), "a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." (footnote omitted).

In *Sierra Club v. Hickel*, 433 F.2d 24, 35 (9th Cir. 1970), *affd. on other grounds sub nom. Sierra Club v. Morton*, 405 U.S. 727 (1972), the Ninth Circuit approved the practice of issuing dual permits to ski resort operators<sup>19</sup> and, in language highly instructive here, stated:

The fact that the record discloses that there are now a total of at least eighty-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit is convincing proof of

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<sup>19</sup>*Sierra Club* vacated a preliminary injunction enjoining the Secretaries of Interior and Agriculture from authorizing a large-scale, private recreational development in the Sequoia National Forest. Because *Sierra Club* involved an interlocutory appeal it required the Ninth Circuit to decide only whether the plaintiffs had shown a strong likelihood of success, it did not make a final determination of the validity of dual permits. That issue therefore technically remains open in the Ninth Circuit. See *Sierra Club v. Morton*, 348 F. Supp. 219, 220 (N.D. Cal. 1972). *Sierra Club* did, however, give detailed consideration to the legality of dual permits.



their legality. Many of these developments are ski developments making use of the maximum acres of the term permit plus revocable permits for additional acreage in amounts in some cases in excess of 6,000 acres . . . It seems apparent, as was obvious to both [the 1956] Senate and House Committees, that the eighty-acre long-term permit was a necessity to obtain proper financing for substantial permanent improvements, while developments of less magnitude and permanency, such as trails, slopes, corrals, could be placed upon lands held under revocable permits.

(footnote omitted) The Forest Service has continued, following the decision in *Sierra Club*, to grant dual permits to ski resort operators. There are presently about 200 ski developments in the national forests and most of them employ dual permits.<sup>20</sup>

The case of *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973), cited by the plaintiffs, does not support their argument. In *Wilderness Society*, the plaintiffs challenged the issuance of rights-of-way and special land use permits by the Secretary of the Interior to a consortium of oil companies for the construction of the Alaska pipeline. The permits covered land greater in width than the express limitation contained in § 28 of the Mineral Leasing Act of 1920, 30 U.S.C. § 185. This court found that § 28 constituted the Secretary's sole authority to issue permits for the use of federal land for oil pipelines, and held that the Secretary had exceeded his authority in failing to adhere to the width limitations. The plaintiffs also contended that the permits issued by the Secretary violated § 497. The court found it unnecessary to decide that claim, and declined to comment on the Ninth Circuit's decision in *Sierra Club*. The court did, however, note that § 497 had "no provision comparable to that in

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<sup>20</sup>S. Rep. No. 1019, 94th Cong., 2d Sess. 8 (1976).



Section 28 of the Mineral Leasing Act expressly stating that no rights-of-way for the uses in question shall be granted except under the provisions, conditions and limitations of the statute." 479 F.2d at 870. That distinction between the language of § 497 and of § 28, together with the legislative history recounted above, indicate clearly enough that § 497, unlike § 28, cannot be read as an exclusive grant of authority as to the uses in question.<sup>21</sup>

Finally, the plaintiffs claim that even if the Secretary had authority under § 497 and 551 to issue dual permits to Northland, the 753-acre permit issued under § 551 is invalid because not actually revocable. We see no merit in this claim. The Forest Service's continuing power to revoke the § 551 permit is apparent from the permit's terms, which state that the permit will terminate on May 1, 1997 unless previously terminated "upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service." (emphasis supplied). The plaintiffs argue that the permit is not truly revocable because the Forest Service's own regulations require a rational basis for the revocation of such permits, see 36 C.F.R. § 251.60(b) (1982), and subject revocations to administrative review. 36 C.F.R. § 211.19 (1982). The plaintiffs have now, however, cited any authority holding that a

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<sup>21</sup>In both 1975 and 1977 the Senate considered bills which would have substantially revised the Forest Service's authority to issue permits for the private recreational use of national forest land. The bills expressly authorized the Forest Service to grant term permits to ski resort operators to areas larger than 80 acres. S. 1338, 95th Cong., 1st Sess. § 3, 123 Cong. Rec. 11,643 (1977); S. 2125, 94th Cong., 2d Sess. § 3 (1976). The bills never became law. Although the bills were intended to achieve a number of goals, they were proposed, in part, because of concern that under *Wilderness Society v. Morton* the Forest Service's practice of issuing dual permits might be illegal. See 123 Cong. Rec. 11,641 (1977) (Remarks of Sen. Haskell); S. Rep. No. 324, 95th Cong., 1st Sess. 11-12 (1977); S. Rep. No. 1019, 94th Cong., 2d Sess. 8-9 (1976). However, as stated above, *Wilderness Society* does not preclude the issuance of dual permits under §§ 497 and 551.

permit to be "revocable," must be revocable at the mere arbitrary will of the issuing authority, and we decline to read such a requirement into the authorizing statute. *Cf. Sierra Club, supra*, 433 F.2d at 35. The plaintiffs also argue that the permit is not revocable because the Forest Service is unlikely to revoke it before the term permit expires. The short answer is that the Forest Service has power to revoke.

### CONCLUSION

We also agree with Judge Richey's disposition of the plaintiffs' remaining claims. Accordingly, we affirm the judgment of the district court.

## APPENDIX "B"

Opinion and Order

Dated June, 1981

### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0481

HOPI INDIAN TRIBE,

*Plaintiffs,*

v.

JOHN R. BLOCK, *et al.*,

*Defendants.*

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Civil Action No. 81-0493

NAVAJO MEDICINEMEN'S ASSOCIATION, *et al.*,

*Plaintiffs,*

v.

JOHN R. BLOCK, *et al.*

*Defendants.*

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Civil Action No. 81-0058

RICHARD F. WILSON and JEAN WILSON,

*Plaintiffs*

v.

JOHN R. BLOCK, *et al.*,

*Defendants.*

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MEMORANDUM OPINION OF UNITED STATES  
DISTRICT JUDGE CHARLES R. RICHEY

The instant action originated as three separate lawsuits brought by the Hopi Indian Tribe, the Navajo Medicinemen's Association and Richard and Jean Wilson. The Hopi Indian Tribe is a federally recognized tribe of American Indians whose aboriginal lands include areas of Northeastern Arizona where the tribe has existed for over one thousand years. The Navajo Medicinemen's Association is an association of medicinemen and medicinewomen who have received special training in the traditional religious beliefs and practices of the Navajo. Richard and Jean Wilson are private landowners who own and periodically occupy a ranch in the area of the San Francisco Peaks—the land in question in this action. Because there were questions of law or fact common to all of these actions, this Court, by Order dated March 10, 1981, consolidated these actions.

The original party defendants are various officials within the Agriculture Department. On May 27, 1981, the Court granted the motion of Northland Recreation Corporation, the permittee on the land in question, to intervene as a defendant.

In their complaints, plaintiffs challenge the action taken by the federal defendants in authorizing the further development of recreational facilities known as the Arizona Snow Bowl located in the Coconino National Forest in Arizona. The approved expansion would take place within a 777 acre permit area of the 75,000 acre area of the San Francisco Peaks. All of these plaintiffs seek to prevent the expansion of the existing facilities; two of the three plaintiffs, the Hopi Indian Tribe and the Navajo Medicinemen's Association, also seek to have the existing facilities removed. Plaintiffs claim that the operation and expansion of this facility constitutes a violation of the plaintiff's First Amendment guarantee of free exercise of religion due to the sacred nature of the mountains and their centrality to both the Hopi and Navajo religions. In addition,

plaintiffs claim that the defendants have violated the American Indian Religious Freedom Act, the National Environmental Policy Act, the Endangered Species Act, the Wilderness Act, the Multiple-Use Sustained-Yield Act, the National Historic Preservation Act, the statutes governing the issuance of permits (Acts of June 4, 1897 and March 4, 1915), an alleged trust relationship between the Forest Service and the native Americans and the Administrative Procedure Act.

Both the federal defendants and the intervenors filed motions to dismiss. The intervenors seek to dismiss the complaint of the Wilson plaintiffs for failure to exhaust administrative remedies and lack of standing to assert constitutional rights of the Indian plaintiffs. The federal defendants have also moved to dismiss the Wilson plaintiffs because of the lack of standing under the First Amendment and the American Indian Religious Freedom Act; and, in addition, the government has moved to dismiss the complaints of the Hopis and Navajos as to their request for the removal of the existing facilities based on the doctrine of laches. The plaintiffs and defendants have also filed cross-motions for summary judgment.

### *I. Motions to Dismiss*

Defendants argue that pursuant to Article III of the United States Constitution which authorized federal courts to hear only bona fide cases or controversies, plaintiffs Wilson lack standing to raise both the First Amendment constitutional issues and the issues concerning the American Indian Religious Freedom Act (AIRFA). Article III's requirement that courts hear only "cases and controversies" dictates that a determination must be made as to whether a party has a sufficient personal stake in the outcome of the controversy and hence whether they have standing. *See Sierra Club v. Morton*, 405 U.S. 727 (1972); *Flast v. Cohen*, 392 U.S. 83 (1968); *Baker v. Carr*, 369 U.S. 186 (1962). Courts have found that a mere

abstract interest in the dispute cannot confer standing upon an otherwise uninjured party. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976); *Sierra Club v. Morton*, 405 U.S. at 735.

The defendants herein allege that the Wilsons have merely an abstract interest in the Indians' First Amendment rights and therefore have no standing to assert those claims without some showing of concrete injury to themselves or their own First Amendment rights. They, as non-Indians, are not the proper proponents of the religious rights allegedly infringed upon by defendants' actions. The Court agrees.

The Supreme Court has repeatedly stated that one may not claim standing to vindicate the constitutional rights of some third party absent a compelling reason to do so. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976); *Flast v. Cohen*, 392 U.S. at 99 n.20; *McGowan v. Maryland*, 366 U.S. 420, 429 (1961); *Barrows v. Jackson*, 346 U.S. 249, 255, *rehearing denied*, 346 U.S. 841 (1953).

In the instant action, there is no compelling reason to allow these plaintiffs to litigate the First Amendment rights of a third of a third party, because the third parties whose rights are being asserted are presently before the Court. Courts have recognized that third parties themselves usually will be the best proponents of their own rights, and that the standing requirement is aimed at assuring that concrete adverseness which sharpens the presentation of the issues upon which the Court so largely depends. *Singleton v. Wulff*, 428 U.S. at 114; *Baker v. Carr*, 369 U.S. at 204. Accordingly, the Court grants defendants' motion to dismiss the Wilson plaintiffs' complaint as to the First Amendment and American Indian Religious Freedom Act claims.<sup>1</sup>

<sup>1</sup>The parties agreed at oral argument to have any papers which had been submitted by the Wilson plaintiffs on the First Amendment and American Indian Religious Freedom Act claims to be received by the Court as *amicus curiae*.

The intervenor-defendants also have moved to dismiss the Wilson plaintiffs' complaint for failure to exhaust administrative remedies. The intervenors claim that the Wilson plaintiffs failed to participate in the final level of administrative review because they merely filed a statement with the Regional Forester within the statutorily required 30-day period which accepted the Regional Forester's decision but reserved their rights with respect to all matters which they had previously raised. The intervenors claim that because 36 C.F.R. § 211.19 provides no specific procedure for preserving one's right to further appeal, this statement is inadequate to constitute notice of appeal. The Court disagrees.

Within the time period specified in 36 C.F.R. § 211.19(k), the Wilsons filed with the Regional Forester a document entitled "Statement in Support of Regional Forester's Decision, Notice of Contingent Appeal and Statement of Reasons in Support thereof or, alternatively, Request to Intervene in Support thereof, Notice of Association of Counsel." The Notice stated, in pertinent part:

For these limited purposes and to avoid any possible waiver, administrative estoppel or res judicata, and any possible effect of the doctrine of exhaustion of administrative remedies, this statement is deemed a Notice of Appeal and statement of reasons in support thereof within the meaning of 36 C.F.R. § 211.19 and to that end all matters previously filed or submitted by Wilson in this appeal of whatever kind or nature are hereby expressly incorporated herein by reference as if set forth verbatim.

This notice was received in the Office of Regional Forester and forwarded to the Chief Forester in Washington, D.C., who, on March 28, 1980, granted the Wilsons' request to participate in further levels of review. On December 31, 1980, the Chief Forester rendered the decision which is the subject of this litigation and further review was declined by the Secretary of Agriculture.



In accordance with the principles that liberality of construction with respect to notices of administrative appeal is the rule, the Court deems the Wilsons' notice to be adequate. "The sufficiency of a notice of administrative appeal should be liberally construed as long as an adverse party is not prejudiced thereby." *Gentry v. United States*, 546 F.2d 343, 348 (Ct. Cl. 1976), *rehearing denied*, 551 F.2d 852 (Ct. Cl. 1977)(a claimant's document simply asking for "review" of the agency's decision was adequate notice); *Pettit v. United States*, 488 F.2d 1026, 1031 (Ct. Cl. 1973)(telephone call to a federal agency was possibly sufficient as a notice of appeal); *Germand v. United States*, 412 F.2d 1190 (Ct. Cl. 1969), *cert. denied*, 414 U.S. 844, *rehearing denied*, 414 U.S. 1017 (1973)(a former employee's letter to the President of the United States and subsequent referral to the Civil Service Commission was deemed clear notice that the plaintiff was appealing the agency decision).

In the instant action, the government plainly had sufficient notice of the Wilson's position to review the case in light of their assertions and therefore were not misled or prejudiced by that notice.<sup>2</sup> Accordingly, the intervenor's motion to dismiss the Wilson plaintiffs for failure to exhaust administrative remedies is denied.

Finally, the federal defendants have filed a motion to dismiss the Hopi Tribe's and Navajo Medicinemen Association's claims seeking removal of the existing Arizona Snow Bowl facilities. Defendants maintain that plaintiffs' claim to such relief is barred by the laches doctrine. However, in light of the Court's disposition of the issues raised by the plaintiffs on summary judgment, the Court need not decide this issue.

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<sup>2</sup>It should be noted that the federal defendants have not raised the defense of failure to exhaust administrative remedies.

## II. *Motions for Summary Judgment*

### A. *Free Exercise of Religion*

The First Amendment to the Constitution of the United States guarantees the Navajo and Hopi plaintiffs that the federal government will take no action "prohibiting the free exercise" of their religions. The plaintiffs herein allege that the defendants' decision to permit the continued operation and further expansion of the Arizona Snow Bowl ski resort on the San Francisco Peaks constitutes a violation of this fundamental obligation. The plaintiffs claim that the San Francisco Peaks play a central, dominant and vital role in both the Hopi and Navajo religions and that the Chief Forester's decision to allow expansion ignores the fact that the free exercise of religion depends upon these mountains remaining sacred and free from manmade disturbances.

The record is replete with descriptions and testimony concerning the Indians' religious beliefs. The Hopi Indians believe that for six months of every year, the "kachinas," spiritual beings sent as emissaries to the Hopis by the creator, reside in the Peaks. During the other six months of the year, they travel to the Hopi villages to participate in the various religious ceremonies and rituals referred to as the Kachina cycle. Numerous Hopi shrines are located in the Peaks and are visited by Hopi religious leaders.

The Navajos believe that the San Francisco Peaks are one of the four sacred mountains making the boundaries of the Navajo homeland. They believe that the mountains bring harmony and balance to the lives of the Navajo people, protect them from destructive forces and sustain the integrity of their spiritual and physical health.

The defendants have stipulated in the Joint Stipulation of Material Facts filed in this matter, that "[t]he Navajo plaintiffs believe that the Peaks are themselves a sacred body and a spiritual being or god with various peaks forming the head, shoulders, and knees of a body reclining and facing the East, while

the trees, plants, rocks and earth form the skin of this sacred body;" that "[t]he Navajo plaintiffs pray directly to the Peaks and regard them as a living diety;" that "[t]he Peaks are invoked in religious ceremonies in order to heal the Navajo people and to bring harmony, balance and natural order to their lives;" that "[t]he Navajo plaintiffs believe that cutting, digging or other manmade disturbances of the natural state of the Peaks causes the deity to lose its healing of the Navajo people and the restoration of harmony, balance and natural order to their lives which such ceremonies effect;" and that the Peaks are important to Navajo religious beliefs and are the subject of many prayers and songs that comprise their religion." See Joint Stipulation of Material Facts, pp. 7-8.

However, despite these religious beliefs, the Chief Forester's decision of December 31, 1980, concluded that "[a]lthough Native Americans may consider development and use of the Arizona Snow Bowl to be adverse to their religious beliefs, neither the First Constitutional Amendment nor the American Indian Religious Freedom Act provide protection from such development." This Court agrees with this determination and accordingly finds for the defendants as to the Free Exercise claim for the following reasons.

The Tenth Circuit, in *Badoni v. Higginson*, 638 F.2d 172, 176-77 (1980), set forth the test under the Free Exercise clause of the First Amendment:

Analysis of a free exercise claim involves a two-step process. We first determine whether government action creates a burden on the exercise of plaintiffs' religion. "[I]t is necessary in a free exercise case to show the coercive effect of the enactment as it operates against . . . the practice of [their] religion. *School District of Abington v. Schempp*, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844 (1963). The practice allegedly infringed upon must be based on a system of belief that is religious, see, e.g., *United States v. Ballard*, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944).

If such a burden is found, the action is violative of the Free Exercise clause, unless the government establishes an interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise clause." *Wisconsin v. Yoder*, 406 U.S. at 214, 92 S. Ct. at 1532.

Defendants here do not challenge the fact that the plaintiffs' beliefs are sincerely held. See Joint Stipulation of Material Facts No. 28. Therefore, in determining whether the Government's action creates a burden on the exercise of plaintiffs' religion, the only real issue is whether there is "a coercive effect of the enactment as it operates against the practice of [their] religion."

As the Court in *Badoni* recognized, Free Exercise claims generally challenge government dictates which compel citizens to violate the tenets of their religion, see *Wooley v. Maynard*, 430 U.S. 705 (1977) (statute requiring all motor vehicles of New Hampshire to bear the motto "live Free or Die" violated Jehovah's Witness followers' First Amendment Rights); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Wisconsin's compulsory education law violated Amish free exercise of religion), or government action which conditions a benefit or right or reward on one's rejection of a religious practice. See *Thomas v. Review Board of the Indiana Employment Security Division*, 49 U.S. L.W. 4341 (U.S. April 6, 1981) (Unemployment compensation may not be denied someone who for religious reasons could not continue to produce weapons); *McDaniel v. Pary*, 435 U.S. 618, 633-34 (1978) (Tennessee provisions barring ministers from serving as delegates or legislators violated the First Amendment); *Sherbert v. Vornor*, 374 U.S. 398 (1963) (Disqualification of appellant from unemployment compensation because of refusal to work on Saturday contrary to religious beliefs violated the Free Exercise clause).

The government here has not forced the plaintiffs to embrace any religious belief or to say or believe anything in con-

flict with their religious tenets; nor have they forced plaintiffs to choose between their religious beliefs and some public benefit. Therefore the Court must look to whether there is a "coercive effect" in that the defendants have prohibited the plaintiffs' practice of their religion. We find there is no such prohibition and, therefore, no such coercive effect which violates the Free Exercise clause.

The government here has not prohibited plaintiffs' religious exercise in the area of the San Francisco Peaks. In fact, plaintiffs have utilized the Arizona Snow Bowl facilities to further their religious practices by gaining access to high levels of the Peaks. See Joint Stipulation of Material Facts No. 2. The affidavits of Dr. Robert Euler and Dr. Jerrold Levy both support the conclusion that as long as the Indians have continued access to the Peaks, the Snow Bowl will not impinge upon the continuation of all essential ritual practices. Levy affidavit ¶¶ 10, 13; Euler affidavit ¶¶ 8-9. Dr. Levy states that the soil and ritual goods used in the ceremony do not have to actually come from the Peaks and that the Snow Bowl permit area does not involve any of the areas used by the Hopi for their shrines or final approach to the Summit or the Peaks. See Levy affidavit ¶¶ 9.9, 9.12, 12. In fact, the Snow Bowl operation has been in existence for nearly fifty years and it appears that plaintiffs' religious practices and beliefs have managed to coexist with the diverse developments that have occurred there.<sup>3</sup>

In *Sequoyah v. TVA*, 620 F.2d 1159, Cherokee Indians challenged the flooding of the Little Tennessee Valley and consequent lack of access to historically significant cities due to completion of the Tellico Dam. The Sixth Circuit determined that because the plaintiffs' claim could not show damage to their *particular religious observances*, there was no burden imposed on the plaintiffs' free exercise of religion. The Court

<sup>3</sup>It should be noted that there are numerous other permitted uses on the Peaks. See Map of the Peaks attached to the Joint Stipulation of Material Facts.

looked to numerous decisions that premised a finding of a Free Exercise violation on a determination of the centrality of plaintiffs' affected practices to their religion and found that the plaintiffs failed to show the "centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances." *Id.* at 1164. See *Wisconsin v. Yoder*, 406 U.S. at 215-216; *Frank v. Alaska*, 604 P.2d 1068 (Alas. 1979) (Meat from an illegally killed moose formed the "cornerstone" of a religiously required funeral patloch); *People v. Woody*, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813, 817, (Cal. 1964) (Court found peyote played a "central" role in a ceremony that was the "cornerstone" of the Native American Church). The Court in *Sequoyah* then looked to the affidavits disclosing that medicines no longer available in the flooded area are available at higher places and determined that the plaintiffs had not shown damage to particular religious observances and, therefore, there was no infringement of a constitutionally cognizable First Amendment right.

In the instant act, the infringement is even less severe because plaintiffs are not denied total access to their religious sites as they were in *Sequoyah*. Plaintiffs do not allege that the Forest Service has prevented them from collecting soil, tree boughs, stones or any other objects from the Peaks nor have they shown that the permit area of the San Francisco Peaks is central or indispensable to their religion. Rather, plaintiffs' action is based on an unusual claim. Plaintiffs are not alleging that the government directly infringed upon their religious beliefs, nor are they alleging that the government directly interfered with or impeded their religious ceremonies. Their claims, instead, are based on the indirect effect that desecration of the Peaks will have on their religion. They are essentially claiming that anyone asserting a religious interest in government property, albeit a sincere one, has a constitutional right to demand that the government grant them access to it, yet restrict the rights of the public to, and any development of,



this property in order to facilitate the exercise of their religious beliefs. This Court will not extend the First Amendment to such limits. Not only is there an insufficient showing of a burden on plaintiffs' Free Exercise rights, but such a result would clearly fly in the face of the principles of the Establishment clause of the First Amendment.

### *B. The Establishment Clause*

Defendants claim that the plaintiffs cannot compel the government to operate the San Francisco Peaks primarily as a religious shrine to satisfy their own particular religious interests, because what the plaintiffs request in the name of the Free Exercise clause is affirmative action by the government which violates the Establishment clause of the First Amendment.

The Court of Appeals for the District of Columbia Circuit has set forth the test under the Establishment clause in the case of *Allen v. Morton*, 495 F.2d 65, 68 (D.C. Cir. 1973). Under *Allen*, an act or law must meet three tests to avoid the Establishment clause: (1) the act or law must reflect a clearly secular purpose; (2) it must have a primary effect that neither advances or inhibits religion; and (3) the act must avoid excessive government entanglement. The relief requested herein by the plaintiffs clearly would not meet the requisite standard. Should the defendants be forced to either discontinue operation of the Snow Bowl or prohibit its expansion, the purpose would not be secular but would be *solely* religious, and its primary effect would be to advance the religious interests of the Indian plaintiffs. The government cannot use federal property for such purposes.

The Tenth Circuit recently dealt with this issue in the case of *Badoni v. Higginson*, 638 F.2d 172, which is based on a very similar set of facts as the case at bar. In *Badoni*, Indian plaintiffs claimed that management by the government of the Rainbow Ridge National Monument and of the Glen Canyon Dam



and Reservoir on the Colorado River 58 miles below the Monument violated the Free Exercise clause for two reasons: (1) in impounding water to form Lake Powell, the government had drowned some of the plaintiffs' gods and denied the plaintiffs access to a prayer spot sacred to them, and (2) by allowing tourists to visit the Rainbow Bridge, the government had permitted desecration of the sacred nature of the site and had denied plaintiffs' their right to conduct religious ceremonies at the prayer spot. In relation to their second claim, the plaintiffs alleged that by permitting public access and the operation of commercial tour boats, the government had burdened the practice of plaintiffs' religion. However, the Court in *Badoni* found that the government had not prohibited plaintiffs' religious exercises in the area of Rainbow Bridge because plaintiffs could enter the Monument on the same basis as other people. *Id.* at 178. The Court went on to say that the government has a strong interest in assuring public access to the monument and that "issuance of regulations to exclude tourists from the Monument for the avowed purpose of aiding plaintiffs' conduct of religious ceremonies would seem a clear violation of the Establishment Clause." *Id.* at 179.

The Court also denied relief insofar as plaintiffs wanted the government to police the actions of the tourists visiting the Monument, stating that:

The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life.

*Id.*, quoting *Otten v. Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Learned Hand, J.). Were it otherwise, the Court reasoned, the Monument would become a government-managed religious shrine. 638 F.2d at 179.

Similarly, the plaintiffs here seek to have the government restrict the public's use of these mountains solely because of the religious beliefs of the plaintiffs. They want the San Francisco Peaks to become a "government-managed religious shrine" to the exclusion of any development. However, the permit area land, which was designated part of the San Francisco Mountain Forest Reserve on August 17, 1898, and became a part of the Coconino National Forest on July 2, 1907, is managed according to numerous federal laws which provide for multiple uses for the benefit of the general public.<sup>4</sup> The Secretary of Agriculture has the duty to maintain the National Forests for multiple uses pursuant to the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 (1976). Pursuant to this authority, the Secretary has developed long-range national resource plans for the management of the natural resources and uses of the national forests. See Kerrick affidavit ¶ 9; Kirkpatrick affidavit ¶ 12. The plaintiffs do not have a constitutional right under the First Amendment to require that the government manage this property as a religious shrine for them; not only is it not required by the First Amendment, but it is clearly prohibited by the Establishment clause.

### *C. The American Indian Religious Freedom Act*

The American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. § 1996, provides that "[o]n or after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut, the Native Hawaiians, including, but not limited to, access to sites, uses and possession of sacred objects, and the freedom to worship through ceremonies and traditional rites."

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<sup>4</sup>See 16 U.S.C. §§ 472-82, 528, 531.

The plaintiffs allege that the Forest Service has wholly failed to apply this law in determining to authorize the expansion of the Snow Bowl facilities. They claim that if the legislation is to have any meaning, then it must require, at the very least, that the defendants take the remedial actions necessary to stop this alleged infringement of the plaintiffs' religious rights. Brief of the Navajo Medicinemen's Association, p. 17.

The defendants argue that AIRFA creates three duties for federal agencies, all of which have been complied with: (1) to evaluate their policies and procedures with the aim of protecting Indian religious freedom; (2) to refrain from prohibiting access, possession and use of religious objects and the performance of religious ceremonies; and (3) to consult with Indian groups in regard to the proposed actions. Defendants here have met their obligations under the Act. The Court agrees.

The legislative history of AIRFA reveals that the purpose of the Act was to "insure that the policies and procedures of various federal agencies as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion." H. Rep. 1308, 95th Cong., 2nd Sess. (1978). The Act was meant to insure that American Indians were given the protection that they are guaranteed under the First Amendment; it was not meant to in any way grant them rights in excess of those guarantees.

What the Act does require is that agencies evaluate their policies and procedures with the aim of protecting Indian religious freedoms. See 124 Cong. Rec. H6872 (daily ed. July 18, 1978) (Remarks of Rep. Udall). Here, the defendants have clearly complied with this mandate. The Administrative Record contains many references to Forest Service meetings with the plaintiffs both on and off the reservations and numerous hearings were held at which Hopi and Navajo representatives testified. See Kirkpatrick Affidavit ¶ 11; Final Environmental Statement ("FES") at 57-60, 159, 164-174.

What the plaintiffs here are really objecting to is not the review process that took place pursuant to AIRFA, but the decision which was rendered as a result of it. However, the Court finds that AIRFA was never meant to have such a broad interpretation. The Act does not require that access to all publicly owned properties be provided to the Indians without consideration for other uses or activities, nor does it require that Native traditional religious considerations always prevail to the exclusion of all else. It requires that the agencies evaluate their policies with the aim of protecting Indian religious freedoms, and that they not deny access to the sacred sites, use and possession of sacred objections and the freedom to worship. The Forest Service has complied with these requirements, and the Court therefore finds no violation of AIRFA.

#### *D. Breach of Fiduciary Duty*

Plaintiffs claim that throughout the administrative proceedings, the defendants have ignored the fiduciary duty which is owed to the Indian plaintiffs by virtue of their guardian-ward relationship. See *Morton v. Mancari*, 417 U.S. 535, 541-42 (1974); *United States v. Kagama*, 118 U.S. 375, 382 (1886). They claim that this responsibility includes the duty to protect traditional Indian resources and communities, as well as the religious beliefs and practices, and that the decision to expand the Arizona Snow Bowl is in direct conflict with the duty to protect the interests of the Indians as their trustee.

However, as plaintiffs have conceded, this fiduciary duty does not exist in a vacuum. The scope of the trust responsibility in an particular situation between a federal agency and an Indian tribe or individual is defined by the statute, treaty or executive order which specifies the particular duty or relationship at issue. *North Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980). In *Gila River Pima-Maricopa Indian Community v. United States*, the Court set forth this principle:

Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive order, or statute under which the claim presently arises. It is true that the word "fiduciary" and the express "guardian-ward relationship" have been used by the courts to describe generally the nature of the relationship existing between the Indians and the government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is "similar to" or "resembles" such a legal relationship and that doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians.

140 F. Supp. 776, 781 (Ct. Cl. 1956).

Plaintiffs allege that the statute which creates this trust responsibility is AIRFA. This argument is indeed unique in that courts have generally found a trust relationship to exist only in cases that deal with Indian property, funds or programs. See *Gila River Prima-Maricopa Indian Community v. U.S.*, 427 F.2d 1194, 1196, 1198-99 (1970), *cert. denied*, 400 U.S. 819 (1970); *Eric v. Secretary of U.S. Department of Housing and Urban Development*, 464 F. Supp. (D. Alas. 1978); *White v. Califano*, 437 F. Supp. 543, 535 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978). However, plaintiffs allege that AIRFA is an unambiguous declaration that the Federal government has a legal responsibility to protect and preserve Indian religious freedom to believe, express and exercise traditional religions.

The Court agrees with the plaintiffs in that the Act imposes an obligation on the federal government to protect Indian religious freedoms when developing any federal policies; however, the Act does not create a "fiduciary relationship" as such,

and the Court is not willing to imply one. The Supreme Court recently spoke to this issue in *United States v. Mitchell*, wherein the statute in question stated that the United States is "to hold land . . . in trust for the sole use and benefit of the" allottee. 445 U.S. 535, 541, *rehearing denied*, 446 U.S. 992 (1980). Even in the face of such explicit language, the Court found that the Act created only a limited trust relationship between the United States and the Indians and did not impose any duty upon the Government to manage timber resources, absent language to the contrary. Therefore, the Court concluded that all of the fiduciary duties ordinarily placed by equity upon a trustee would not be imposed on the government. *Id.*

Similarly, in the instant action, this Court will not impose all of the obligations of a fiduciary relationship on the government solely on the basis of AIRFA.<sup>5</sup> To the extent that AIRFA imposes duties and obligations on the federal government with respect to Indian religious freedoms, the Court has already determined that the government has complied with the statute.

#### *E. The National Environmental Policy Act*

Plaintiffs allege that the Final Environmental Statement for the Arizona Snow Bowl Ski Area Proposal ("FES") is inadequate under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq.*, because it fails to adequately address the environmental consequences of the proposed expansion with respect to: 1) endangered and threatened plant species; 2) Native American religion and culture; 3) the economy; 4) historic and cultural sites.

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<sup>5</sup>The plaintiffs also allege that several other statutes define a trust-based duty relevant to this case, however, the Court finds these to be inapplicable. See 25 U.S.C. §§ 13, 452, 1601; Treaty of 1850, 9 Stat. 974, ¶ I, XI.



NEPA requires the responsible federal official to include for the "major federal action significantly affecting the quality of the human environment" a "detailed statement" which analyzes "the environmental impact of the proposed action." 42 U.S.C. § 4332(c). Judicial review of administrative decisions in NEPA cases is a narrow one. The role of the Court is not to substitute its own judgment for that of any agency as to the environmental consequences of its proposed action, but only to insure that the agency has taken a "hard look" at those consequences. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The plaintiffs who challenge the adequacy of an FES have the burden of proof on all issues, and are required to establish by a preponderance of the evidence that the FES is inadequate, *Sierra Club v. Morton*, 510 F.2d 813, 818 (5th Cir. 1975). The detail required in the FES is only "that necessary to establish that an agency in good faith objectivity has taken a sufficient look at the environmental consequences of the proposed action and alternatives to that action." *Save Our Sycamore v. Metropolitan Atlanta Rapid Transit Authority*, 576 F.2d 573, 576 (5th Cir. 1978). The Court's review of the adequacy of the FES is governed by a rule of reason:

We are governed by a "rule of reason," *Carolina Environmental Study Group v. United States*, 166 U.S. App. D.C. 416, 418; 510 F.2d 796, 798 (1975), and our task is "to determine whether the [FES] was compiled with objective good faith and whether the resulting statement would permit a decision-maker to fully consider and balance the environmental factors." *Sierra Club v. Morton*, 501 F.2d 813, 819 (5th Cir. 1975).

*Sierra Club v. Adams*, 578 F.2d 389, 393 (D.C. Cir. 1978).

Upon review of the FES in the present case, the Court has determined that the plaintiffs have not met their burden of proof of inadequacy; the FES clearly sets forth sufficient information to enable the decision-maker to fully consider the



environmental factors involved and make a reasoned decision. The possible effect of the proposal on rare, threatened or endangered species,<sup>6</sup> Native American religious and cultural issues,<sup>7</sup> historic and cultural sites,<sup>8</sup> wilderness considerations,<sup>9</sup> human-caused fires,<sup>10</sup> insect and disease activity,<sup>11</sup> soil erosion<sup>12</sup> and the economy<sup>13</sup> are all discussed in sufficient detail in the FES. "An [FES] need not be exhaustive to the point of discussing all possible details bearing the proposed action . . ." *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

In addition, plaintiffs contend that the defendants failed to employ an interdisciplinary approach in preparing the FES. In fact, the FES was developed by an interdisciplinary team;<sup>14</sup> an archaeologist and several authorities on Hopi culture and religion were consulted regarding historic sites and native American religion and culture,<sup>15</sup> a wildlife biologist and botanist provided information concerning the rare species and Alpine Tundra environment,<sup>16</sup> and information was requested from Hopi and Navajo religious practitioners.<sup>17</sup>

Plaintiffs also contend that the FES is inadequate in that defendants have overestimated the benefit of the plan to the Flagstaff economy and have given insufficient weight to envir-

<sup>6</sup>See FES at 45-47, 126-127, 130, 176-177.

<sup>7</sup>See FES at 57-62, 73, 132-133, 156, 159-160.

<sup>8</sup>See FES at 62-63.

<sup>9</sup>See FES at 51, 136.

<sup>10</sup>See FES at 126.

<sup>11</sup>See FES at 128-130.

<sup>12</sup>See FES at 130.

<sup>13</sup>See FES at 64-65.

<sup>14</sup>See FES at 209; Kirkpatrick Affidavit ¶ 10.

<sup>15</sup>See Pilles Affidavit ¶ 6; Kirkpatrick Affidavit ¶ 10; FES at 61.

<sup>16</sup>See Kirkpatrick Affidavit ¶ 11.

<sup>17</sup>See FES at 57-61, 159.

onmental values and in so doing have subordinated Native American religious interests to recreational and commercial interests. However, the Supreme Court has made it clear that in reviewing the adequacy of an FES, courts ought not to rebalance competing policies. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980). A court may not substitute its judgment for that of the agency as to the necessity or desirability of the project in question. *Jicarilla Apache Tribe of Indians v. Morton*, 471 F.2d 1275, 1279-80 (9th Cir. 1973).

In sum, the Court has determined that the FES is adequate and that the agency took a sufficient look at the environmental consequences of its action and alternatives<sup>18</sup> to its action and therefore is in compliance with the applicable provisions of NEPA.

#### *F. Endangered Species Act of 1973*

Plaintiffs allege numerous violations of the Endangered Species Act of 1973 ("ESA"), 16 U.S.C. §§ 1531 *et seq.* The focus of the plaintiffs' complaint involves *Senecio Franciscanus*, the "San Francisco Peaks groundsel." Plaintiffs claim that this is a threatened species as defined in the ESA and that therefore the protections of section 7 of the Act, 16 U.S.C. § 1536, apply. The defendants, however, claim that because this plant is not "listed" pursuant to section 1533 of the Act, it is not entitled to the protections of section 1536 of the Act. Upon analysis of the statute and its legislative history, the Court finds that a species must be "listed" to be protected by the Act, and accordingly finds that the defendants were not required to comply with the procedures of the ESA.

Plaintiffs allege that numerous provisions of the ESA were violated. They first contend that the decision to develop the

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<sup>18</sup>See FES at 16-17, 76-111, 123-141.

Snow Bowl constitutes a violation of 16 U.S.C. § 1536 (a) (1) which requires federal agencies to carry out programs "for the conservation of endangered species and threatened species *listed pursuant to Section 1533* (emphasis added)." Clearly, *S. Franciscanus* would have to be listed to fall within the ambit of this provision.

The plaintiffs' second allegation, which is the crux of their argument under the ESA, is that the defendants have violated section 1536 (a) (2) which reads:

Each Federal Agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

Plaintiffs claim that because the defendants never complied with this requirement of "consultation"<sup>19</sup> they have clearly violated the ESA. Defendants, however, again argue that because none of the plant species at issue have been "listed," the ESA does not apply and therefore the Forest Service was never legally bound to comply with this requirement of consultation with the Department of Interior.

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<sup>19</sup>There is evidence in the record that defendants did contact the U.S. Fish and Wildlife Service to perform assessments; however, then defendants did not comply with the requirements under 16 U.S.C. § 1536(b) that include a detailed written statement from the Secretary to the federal agency involved.

This presents a somewhat more difficult problem for the Court. Section (a) (2) does not expressly state that the endangered or threatened species must be listed pursuant to section 1533 of the Act, it merely states that if an agency's action will jeopardize the continued existence of *any* endangered species or threatened species, the consultation must occur. "Endangered species" is defined as "any species which is in danger of extinction throughout all or a significant portion of its range other than [certain insects]." 16 U.S.C. § 1532 (b). "Threatened species" is defined as "any species which is likely to become an endangered species within the foreseeable future throughout any or a significant portion of its range." 16 U.S.C. § 1532 (20). Because neither of these definitions requires that a plant be listed to be considered endangered or threatened, the defendants argue that section 1536 (a) (2) was meant to apply to any endangered or threatened species *whether it is listed or not*. While the Court finds their argument somewhat persuasive, it has determined, upon thorough analysis, that such an interpretation cannot stand.

Pursuant to 16 U.S.C. § 1533, "the Secretary of the Interior shall by regulation determine whether any species is an endangered species or a threatened species . . ." and then, pursuant to further requirements of the statute, formally list them. Clearly the Act intended that such a determination be left to the Secretary of the Interior, and therefore most of the references to "endangered" or "threatened" species expressly specify "listed pursuant to section 1533 of this title." See 16 U.S.C. §§ 1532 (a) (1), (c) (1), (d). However, section (a) (2), by not expressly qualifying such species as "listed" has created an ambiguity. Apart from a very general definition of the terms "endangered" and "threatened," see 16 U.S.C. §§ 1532 (6), (20), there is no indication of how such a determination should be made, apart from the listing by the Secretary of the Interior. Nor is there any indication that Congress intended to leave such a determination to the courts. Accordingly, the Court

must look to the legislative history for guidance as to whether Congress intended that section 1536 (a) (2) should be read to include species that have not been officially listed under the express terms of section 1533 of the Act. The legislative history does not support such a conclusion.

The House Report for the 1978 amendment to the ESA states:

The protections provided to animal and plant species threatened with extinction are activated by the listing of a species as "endangered" or "threatened."

H. Rep. No. 1625, 95th Cong., 2nd Sess. 5 (1978). "The mandate of Section 7 applies once a species is listed." *Id.* at 7.

In addition, the House Conference Report for the 1979 amendments states:

The conferees note that the purpose of a listing proposal is to determine whether a species is endangered or threatened and should be listed as such. *The protection of Section 7 [1536] should not apply until a species has been formally listed.*

H. Conf. Rep. No. 697, 96th Cong., 1st Sess. 13 (1979) (emphasis added).<sup>20</sup> Based on this language and the fact that Congress set forth no standards for a judicial interpretation of what constitutes an endangered or threatened species, this Court finds that a species must be listed by the Secretary of the Interior before the protective provisions of the ESA apply. Accordingly, because none of the species named by plaintiffs has been listed, the protections do not apply in this case.<sup>21</sup>

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<sup>20</sup>As plaintiffs point out, the statutory language in question here was included in the ESA in the 1978 amendments and the legislative history cited to by the defendants is the House Conference Report of the 1979 amendments. However, section 1536 (d) (2) is not changed by any language in the 1979 amendments, and the language is relevant as to Congress' intent that section 7 only apply to formally listed species; it does not go to any specific portion of the 1979 amendment.

*G. National Wilderness Preservation System Act of 1964*

Plaintiffs allege that defendants' authorization of the expansion of the Arizona Snow Bowl interferes with the statutory authority of the President and Congress to recommend and designate, respectively, areas as "wilderness" under the Wilderness Act of 1964, 16 U.S.C. §§ 1131 *et seq.* Specifically, plaintiffs allege that the defendants have violated 16 U.S.C. § 1132 (b), which allows the President to recommend for inclusion in designated "wilderness" areas, lands contiguous to areas formerly designated as "primitive" by the Secretary of Agriculture. They claim that the decision to permit expansion deprives the Secretary of his discretion to designate the permit area as "wilderness." Defendants, on the other hand, contend that because the land on the San Francisco Peaks was not previously classified as "primitive" and because the permit area is not "predominantly of wilderness value," section 1132 (b) does not apply here. The court agrees that the plaintiffs' claim must fail.

Although a substantial amount of land adjacent to the Arizona Snow Bowl permit area has been recommended by the Secretary of Agriculture and the President for wilderness designation, the permit area was specifically not included due to the

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<sup>21</sup>The plaintiff Navajo Medicinemen's Association, in their opposition to defendants' motion for summary judgment, alleges that if the Court should find that a species must be "listed" to invoke the protection of the ESA, equity should require the defendants to treat *S. Franciscanus* as if it were formally listed as threatened because of: 1) assurances in the FES that the plant would be given full consideration under the Act; and 2) the reason the plant is not now formally listed is due to unreasonable delay on the part of the Secretary of the Interior.

The Court will not extend equity principles this far; it is the Department of Interior who makes a determination as to whether a species should be listed, not the Forest Service. Therefore, the FES is not determinative of whether a species should be given protection under the Act. Secondly, there is insufficient evidence to support the theory of unreasonable delay substantial enough to require the Court to force the defendants to "list" this species.



various man-made disturbances that have already occurred there. See Peterson Affidavit ¶¶ 9-10, 12; FES at 6, 51. None of the recommended land was previously designated "primitive" or "wilderness." See Peterson Affidavit ¶ 5. Plaintiffs claim that no further development should occur on the permit area because it is contiguous to an area proposed for designation and therefore the President and Congress have discretion to eventually include this land as wilderness under 16 U.S.C. § 1132 (b). However the statute clearly states that "nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alteration of existing boundaries of *primitive areas* or recommending the addition of any contiguous area of national forest lands *predominantly of wilderness value*." 16 U.S.C. § 1132 (b) (emphasis added).

Plaintiffs rely on the case of *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972), which enjoined the Forest Service from the sale of timber proposed to be cut from national forest land because it would deprive the President and Congress of their discretion to designate it as wilderness. However the case is easily distinguishable and serves to reinforce the defendants' position. The National Forest land in *Parker* was contiguous to a designated "primitive" area and therefore fell within the ambit of 16 U.S.C. § 1132 (b). Secondly, the contiguous land in *Parker* was found to meet the "minimum requirements of suitability for wilderness classification" which is defined by the Wilderness Act as:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where earth and its community of life are untamed by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or habitation, which is protected and



managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic or historical value. 16 U.S.C. § 1131 (c).

The permit area land which is at issue in the instant action clearly does not fall within this definition. At the time when the President recommended adjacent lands for wilderness designation,<sup>22</sup> there was a ski lodge, ski runs, all of which necessitated the clearing of trees. The land is not "an area of undeveloped Federal land retaining its primeval characteristics and influence, without permanent improvements or human habitation" and "without the imprint of man's work."

Accordingly, because the adjacent land which has been recommended for wilderness designation is not "primitive" and because the permit area is not land "predominantly of wilderness value," the plaintiffs' claim under section 1132 (b) must fail.

#### *H. Multiple-Use Sustained-Yield Act of 1960*

The plaintiffs herein allege that the defendants have abused their discretion under the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"), 16 U.S.C. § 528, which declares that "the

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<sup>22</sup>Even if section 1132 (b) were to apply, the fact that the President has already considered this area for wilderness status and chose not to include the permit area is also an indication that his statutory discretion would not be interfered with by this proposal.

national forests are established and shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes," and section 529 which states that "the Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom . . . due consideration shall be given to the relative values of the various resources in particular areas." Plaintiffs assert that the Forest Service acted arbitrarily in approving the proposed expansion and by favoring the Flagstaff economy and recreation over religious significance and other uses. This argument must fail.

The decision as to the proper mix or uses in any given area is left to the sound discretion and expertise of the Forest Service. *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alas. 1971). Courts have declined to involve themselves in the executive decision making absent a showing that the decision is arbitrary, capricious or an abuse of discretion. As the Court of Appeals for the Ninth Circuit stated in declining to review a Forest Service decision:

this Court has neither the technical expertise nor the intuitive knowledge gained from daily acquaintance with this subject to provide an informed review of executive decision making.

*Hi-Ridge Lumber Co. v. United States*, 443 F.2d 452, 455 (9th Cir. 1971).

MUSYA does not require that all uses will exist in a forest, or that all uses will exist in equal amounts. The record demonstrates that other multiple uses exist in the San Francisco Peaks, including grazing, timber cutting, water and energy delivery systems, communication facilities and wildlife protection. See Kerrick affidavit ¶ 9. In addition, the Forest Service considered the religious significance of the Peaks and determined that the religious practices of the Native Americans were compatible with the other multiple uses of the Peaks and the minor expan-

sion for recreational purposes *within* the 777 acre permit area. The San Francisco Land Use Plan approved on July 23, 1974, specifically designates the Snow Bowl area for recreational purposes. *See* FES at 160.

Accordingly, the Court finds that the defendants did not act arbitrarily pursuant to its MUSYA obligations in approving the expansion of the Snow Bowl facilities.

*I. National Historic Preservation Act  
and Executive Order 11593*

Plaintiffs contend that the defendants have failed to comply with the requirements of the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and the regulations promulgated thereunder, 36 C.F.R. §§ 800 *et seq.*, for two reasons. First, they contend that in approving expansion of skiing and recreational activities and in widening the Snow Bowl road, defendants violated the provisions of the Act with respect to two National Register properties in the vicinity of the permit area. Secondly, plaintiffs contend that defendants did not comply with the Act concerning the eligibility of the San Francisco Peaks themselves for inclusion in the National Register. Defendants, on the other hand, contend that formal compliance was not yet required under the Act but will be done before approval of any construction. They claim that an informal determination that the two registered properties in the vicinity of the permit would not be affected either directly or indirectly was sufficient. They also claim that the Peaks themselves are ineligible for listing on the National Register and therefore are not entitled to the protections of the Act.

Section 470a of the NHPA authorizes the Secretary of the Interior "to expand and maintain a national register of districts, sites, buildings, structures and objects significant in American History, architecture, archaeology and culture" known as the National Register and establishes the Advisory

Council on Historic Preservation. In addition, 16 U.S.C. § 470f provides that:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any state and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.<sup>23</sup>

"Undertaking" is defined as "any Federal, federally assisted or federally licensed action, activity or program or the approval, sanction, assistance or support of any non-Federal action, activity or program . . ." 36 C.F.R. § 800.2 (c). Defendants construe "undertaking" to mean the actual site-specific construction plan for the preferred alternative and not the FES. Thus

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<sup>23</sup>Similarly, Executive Order 11593 provides that the federal government "shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the nation." Section 2 of the Order provides that the heads of federal agencies shall cooperate with the Secretary of the Interior and the State Historic Preservation officer in locating sites which appear to qualify for listing on the National Register of Historic Places. During the interim period when potential sites are being evaluated and located, caution is required to insure that federal properties which may qualify for nomination are not altered or destroyed. Any questionable actions are to be referred to the Secretary of the Interior for an opinion concerning the property's eligibility in the National Register based on consultation with the State Historic Preservation Officer. See 3 C.F.R. 559.

they assert that the formal determination of effect and the formal consultation with the State Historic Preservation Officer were not performed as of the FES stage but will be done before approval of any construction. Plaintiffs contend that the decision to approve the expansion falls squarely within the definition of an "undertaking" and pursuant to 36 C.F.R. § 800.4 "as early as possible before an agency makes a final decision concerning an undertaking and in any event prior to taking any agency action that would foreclose alternatives of the council's ability to comment, the Agency official shall take the steps set forth in 36 C.F.R. § 800.4 (a)-(e). The Court agrees with the plaintiffs and accordingly finds that the relevant portions of 36 C.F.R. §§ 800 *et seq.* should have been complied with prior to the Agriculture Department's authorization of the plan.

Subsections (1) - (4) of 36 C.F.R. § 800.4 (a) clearly place an affirmative duty upon the responsible agency official to identify properties listed on the National Register, or eligible for inclusion which have not been listed that exist within the area of the undertaking's potential environmental impact. Then the federal official, in consultation with the State Historic Preservation Officer, must determine "whether the undertaking will have an effect upon this historical, architectural, archaeological or cultural characteristics of the property that qualified it to meet National Register Criteria. 36 C.F.R. § 800.3 (a). If the agency official, in consultation with the State Historic Preservation Officer, finds that the undertaking will not affect these characteristics, it may proceed provided that the Agency official shall document each determination of no effect, which shall be available for public inspection.

Plaintiffs submit that in approving the expansion, the defendants violated NHPA, Executive Order 11593 and the foregoing regulations with respect to two National Register properties; the C. Hart Merriam Base Camp, located several miles northwest of the project area, and the Fern Mountain Ranch, owned by

plaintiffs Wilson and located 2 miles north of the project area. The Court agrees.

The Forest Service apparently did consider these two historic sites and determined that the proposed plan would have "no effect" on them. See FES p. 62-63. The Forest Supervisor determined that no impact would occur and the project was not given any further NHPA evaluation. However, the regulations clearly require consultation with the State Historic Preservation Officer as well as a written documentation if "no effect" is found. 36 C.F.R. § 800.4 (4) (b) (1). There is no evidence in the record that the defendants complied with these regulations. Accordingly, the project cannot be sanctioned until such compliance occurs.

In addition, plaintiffs allege that the mountains themselves should be considered as eligible. Defendants did not consult with the Secretary of the Interior or the State Historic Preservation Officer or the Advisory Council concerning the eligibility of the San Francisco Peaks for inclusion in the National Register based on the claim that because the mountains are a property used for religious purposes, they are not eligible for inclusion in the National Register pursuant to 36 C.F.R. § 1201.6. However, that provision specifically provides that "religious property" which derives "primary significance" from its "historical importance" is eligible for inclusion in the National Register. The Court finds, therefore, that the Forest Service should have consulted with the State Historic Preservation Officer to determine if the Peaks themselves are eligible for inclusion in the National Register. 36 C.F.R. § 800.4 (a) (1). Because there is no evidence in the record that this has been done, the Court will remand this matter to the Forest Service for full compliance with NHPA and the applicable regulations.

*J. The Permits for the Arizona Snow Bowl*

Plaintiffs contend that the defendants have no authority to allow the use of the entire 777 acre tract of land under permit for recreational purposes. Essentially, they are challenging a dual permit device that is used as a means of avoiding an eighty acre recreation and resort limitation imposed by 16 U.S.C. § 497. Defendants contend that the dual permit system is a valid exercise of authority pursuant to the two authorizing statutes in question. The Court agrees with the defendants and accordingly upholds the use of dual permits.

The Forest Service has issued two permits to Northland Recreation which cover a total of 777 acres. One of the permits is an annual or revocable permit which covers 757 acres; the other is a term permit for the period of 20 years covering 20 acres. The revocable permit was issued pursuant to broad authority granted to the Forest Service by the Organic Act, 16 U.S.C. § 551, which gives the Secretary of Agriculture the authority to "make such rules and regulations . . . as will insure the objects of such regulations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." Term special use permits are issued under the Act of March 4, 1915, as amended, which provides in pertinent part, that the Secretary of Agriculture:

is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts and any other structures or facilities necessary or desirable for recreation, public convenience, or safety . . . (c) to permit the use and occupancy of suitable areas of land within national forests, not exceeding eighty acres and for a period not exceeding thirty years, for the purpose of constructing and maintain-



ing buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses of the national forests.

16 U.S.C. § 497.

Plaintiffs allege that the 1915 Act limits the defendants' authority to issue recreational permits for areas exceeding eighty acres. Defendants, however, claim that the plain language of the 1897 Act establishes the authority to promulgate regulations requiring permits to occupy and use national forest lands under terms and conditions which he deems proper, and that there is no indication that the 1915 Act was meant to limit that authority, either on the face of the statute or in the legislative history.

In looking to the legislative history of the 1915 Act, there is no explicit approval of the combined use of term and revocable permits.<sup>24</sup> However, when the Act of 1915 was amended in 1956,<sup>25</sup> the House Agriculture Committee Report stated that Congress did not intend to limit the Secretary's broad authority to issue revocable permits under the 1897 Act but instead wanted to broaden his authority to issue term permits under the 1915 Act:

The Department of Agriculture now has adequate authority to issue revocable permits for *all purposes* under the Act of June 4, 1897 (16 U.S.C. § 551). Its authority to issue term permits . . . would be broadened by S. 2216.

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<sup>24</sup>As discussed in the legislative history of the 1915 Act, the reason for establishing a term permit was to insure adequate financing for privately-built improvements on Forest Service land. See H. Rep. No. 1255, 63rd Cong. 3rd Sess. 14 (1914).

<sup>25</sup>The 1915 Act was amended by the Act of July 18, 1956, to increase allowable acreage from five to eighty acres and to expand the purposes for which term permits could be granted to include commercial development. 70 Stat. 708.

H. Rep. No. 2792, 84 Cong. 2d Sess. (1956) (emphasis added). There is no indication in the legislative history that Congress intended to limit the authority under the 1897 Act to issue revocable permits for recreational use. In addition, as defendants point out, "under some circumstances, Congressional failure to repeal or revise [a statute] in the face of administrative interpretation has been held to constitute persuasive evidence that the interpretation is one intended by Congress." *Zemel v. Rusk*, 381 U.S. 1, 11 (1956). Presently the Forest Service has permitted the use of some 150 recreational ski facilities by virtue of this dual permit system, and there is no evidence of Congressional disapproval.

The Ninth Circuit Court of Appeals confronted this dual permit system in the case of *Sierra Club v. Hickel*, 433 F.2d 24, 34-36 (1970). The Court held that the use of term and revocable permits by the Secretary of Agriculture in connection with a large-scale recreational facility would not amount to an impermissible exercise of administrative authority.<sup>26</sup> Based on an exhaustive legislative history, the Court found that the 1956 amendment to the 1915 Act increased the Secretary's term permit authority and did not limit his power to issue revocable permits or combine the use of term and revocable permits:

It seems apparent, as was obvious to both Senate and House Committees, that the eighty acre long-term permit was a necessity to obtain proper financing for substantial permanent improvements, while developments of less magnitude and permanency, such as trails, slopes, corrals could be placed upon lands held under revocable permits. We find no indication in those reports that ski lifts are limited to term permits.

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<sup>26</sup>This decision was affirmed only as to the standing issue in *Sierra Club v. Morton*, 405 U.S. 727 (1972) ("As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other question and we intimate no views on the merits of the complaint.").

433 F.2d at 35.

Plaintiffs claim that decision is not binding or persuasive authority and rely instead on the case of *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973). In that case, the plaintiffs argued that the issuance of rights-of-way and special land use permits by the Secretary of the Interior for construction of the Alaska pipeline would violate section 28 of the Mineral Leasing Act of 1920 by exceeding explicit limitations of that section. The Court found for the plaintiffs based on a finding that the language of the statute indicated that it was to be exclusive authority for rights-of-way in the transportation of oil. The plaintiffs also alleged that the permit violated the eighty acre limitation of 16 U.S.C. § 497, to which the Court responded that "the statute involved in that case . . . has no provision comparable to that in Section 28 of the Mineral Leasing Act expressly stating that no rights-of-way for the uses in question shall be granted except under the provisions, conditions and limitations of the statute." 479 F.2d at 870.

Similarly, there is no provision in 16 U.S.C. § 497 that states that no recreational permits shall be granted except under the provisions, conditions and limitations of the statute. Nor is there any indication that the statute was intended to repeal the broad authority granted under the 1897 Act. Neither statute is exclusive, either by actual terms or discernible intent, as to the Secretary's authority concerning recreational permits, and it is well-settled that repeals by implication are not favored and in order to do so "the intention of the legislature to repeal must be 'clear and manifest.'" *Watt v. State of Alaska*, 49 U.S.L.W. 4433, 4435 (U.S. April 21, 1981). Accordingly the Court agrees with the Ninth Circuit's finding in *Sierra Club v. Hickel* that the dual permit system is a valid exercise of agency authority.

*K. The Administrative Procedure Act*

Plaintiffs contend that the Forest Service has violated the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 *et seq.*, because the agency action was arbitrary, capricious and an abuse of discretion.<sup>27</sup> Plaintiffs specifically allege that the record clearly discloses bias and prejudice on the part of the Forest Service in favor of further commercialization of the San Francisco Peaks. Plaintiffs cite to: 1) a letter from the District Ranger to the permittee which allegedly attempts to assist the permittee in arguing for public support; 2) two matrices in which the Forest Service calculated the impacts of various plans that allegedly favored development; 3) the FES and Decision of the Chief Forester which allegedly fail to provide legally sufficient justifications for the selection of the preferred alternative and ignored indications of harm to Indian religious beliefs and practices; 4) a letter from Senator DeConcini to Peterson, the Regional Forester, urging development of the project and thanking him for his mutual cooperation. All of these items, plaintiffs urge, indicate a wholly arbitrary and unjustified weighing of factors and an abuse of agency discretion, and therefore, plaintiffs contend that the actions of the Forest Service should be held unlawful and set aside pursuant to the APA. The Court finds no such violation.

The "arbitrary and capricious" standard of review is a narrow one which precludes the Court from substituting its own judgment for that of the agency, or from inquiring into the mental processes of the administrative decisionmakers.

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<sup>27</sup> This is in addition to their contentions throughout that the action of the Forest Service in authorizing the "preferred alternative" was contrary to its constitutional power and in excess of its statutory authority. The matters discussed in the previous sections are challenged under the APA as well as those independent statutes.

*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 420 (1971). The standard presumes that the agency action is valid, and the Court must find only that the action was based on a consideration of the relevant factors. *Id.* at 416. We find that the decision in this matter was based on such a consideration despite plaintiffs' references to limited portions of the record.

Plaintiffs claim that the decision was biased heavily in favor of further commercialization of the San Francisco Peaks, yet the alternative selected by the Forest Service severely limited the amount of development proposed by the permittee. See FES at 7-8, 10. Additionally, there is much information included on the subject of Indian religious beliefs and the consideration of such beliefs in rendering this decision. Furthermore, there is no indication that the Chief Forester premised his decision on anything other than the merits of the case, or that a letter on Congressional stationery urging an expedited decision and expressing the Senator's view constituted undue congressional influence. See *D.C. Federation of Civil Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972).

In short, the Court finds that the plaintiffs have not made a showing of bias or prejudice sufficient to compel the Court, pursuant to the APA, to find this decision to be arbitrary and capricious.

#### *L. Conclusion*

Accordingly, in light of the above analyses and pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court grants summary judgment to the defendants on all counts except for the claim under the National Historic Preservation Act. On that issue, the Court remands this matter to the Department of Agriculture for compliance with the NHPA and the regulations promulgated thereunder. Pursuant to 36 C.F.R. § 800.4(e), all activity on this project is suspended until the Act has been complied with.

An Order in accordance with the foregoing has been issued  
as of the date below.

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Charles R. Richey  
United States District Judge

Dated: June 15, 1983  
At 1:43 p.m.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 81-0481

HOPI INDIAN TRIBE,

*Plaintiffs*

v.

JOHN R. BLOCK, *et al.*,

*Defendant.*

---

Civil Action No. 81-0493

NAVAJO MEDICINEMEN'S ASSOCIATION, *et al.*,

*Plaintiffs,*

v.

JOHN R. BLOCK, *et al.*,

*Defendant.*

---

Civil Action No. 81-0558

RICHARD F. WILSON and JEAN WILSON,

*Plaintiffs,*

v.

JOHN R. BLOCK, *et al.*,

*Defendant.*

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## ORDER

Upon consideration of the entire record herein, and in accordance with the Memorandum Opinion issued of even date herewith, it is, by the Court, this 12th day of June, 1981, hereby

ORDERED that the defendants' motion to dismiss the Wilson plaintiffs' complaint as to the First Amendment and AIRFA claims be, and the same hereby is, granted; and it is

FURTHER ORDERED that the intervenor-defendant's motion to dismiss the Wilson plaintiffs' complaint for failure to exhaust administrative remedies be, and the same hereby is, denied; and it is

FURTHER ORDERED that the plaintiffs' motions for summary judgment be, and the same hereby are, denied; and it is

FURTHER ORDERED that the defendants' motion for summary judgment be, and the same hereby is, granted on all counts except the claims under the National Historical Preservation Act as set forth in Count III of the Hopi Tribe's complaint and Count II of the Wilsons' complaint; and it is

FURTHER ORDERED that as to Count III of the Hopi Tribe's complaint and Count II of the Wilsons' complaint this case shall be, and the same hereby is, remanded to the Secretary of Agriculture for further proceedings in accordance with the Memorandum Opinion issued of even date herewith, or as soon thereafter as can be typed and proofread.

Charles R. Richey  
United States District Judge

## APPENDIX "C"

### OPINION AND ORDER

Dated May 14, 1982

#### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0481

THE HOPI INDIAN TRIBE,

*Plaintiff,*

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,

*Defendants.*

---

Civil Action No. 81-0493

NAVAJO MEDICINEMEN'S ASSOCIATION, *et al.*,

*Plaintiffs,*

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,

*Defendants.*

---

Civil Action No. 81-0558

RICHARD F. WILSON, *et al.*,

*Plaintiffs,*

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,

*Defendants.*

---

MEMORANDUM OPINION OF UNITED STATES  
DISTRICT JUDGE CHARLES R. RICHEY

This matter is before the Court of defendants' motion for entry of final judgment, plaintiff Hopi Indian Tribe's Rule 60(b) motion, and plaintiff Navajo Medicinemen's Association's motion for relief from judgment pursuant to Rule 59(e) and Rule 60(b). The Court, upon consideration of these motions, the oppositions thereto, and the entire record herein, has determined that the defendants' motion for entry of final judgment should rightfully be granted and that the plaintiffs' motions for relief should be denied for the reasons as set forth herein.

*History of Litigation*

Plaintiffs in this action initially filed complaints seeking injunctive, declaratory and mandamus relief in order to prevent defendants from authorizing the further expansion of recreational facilities at the Arizona Snow Bowl in the Coconino National Forest in Arizona. The Hopi and Navajo plaintiffs were seeking removal of the existing facilities at the site as well. Plaintiffs alleged a violation of the Free Exercise Clause of the First Amendment, the American Indian Religious Freedom Act, the National Environmental Policy Act, the Endangered Species Act, the Wilderness Act, the Multiple Use-Sustained Yield Act, the National Historic Preservation Act, the statutes governing the issuance of permits, a trust responsibility between the federal government and the Indian Tribes and the Administrative Procedure Act.

On June 15, 1981, this Court entered a Memorandum Opinion granting summary judgment to the defendants on all counts except for the claim under the National Historic Preservation Act. On that issue, this Court remanded the matter to the Department of Agriculture for compliance with the National

Historic Preservation Act (NHPA) and the regulations promulgated thereunder. Development of the facilities was suspended pending such compliance.

Defendants are now before the Court seeking entry of final judgment. They claim that they have now fully complied with the NHPA and that accordingly the Court may enter final judgment for the defendants and the project may continue.

Plaintiffs, however, in addition to opposing the motion for entry of final judgment, are before the Court on a Rule 60(b) motion and a Rule 59(e) motion. They claim that there is new evidence that has been discovered which would alter this Court's decision of June 15, 1981, and accordingly seek judgment in their favor.

#### *Motion for Entry of Final Judgment*

This Court, in its opinion dated June 15, 1981, found that the defendants had not consulted with the State Historic Preservation Officer (SHPO) or provided written documentation as required by the statute and regulations. The Court also held that the defendants had not consulted with the SHPO concerning the eligibility of the San Francisco Peaks themselves for inclusion in the National Register of historic properties.

The Court finds that the defendants have now complied with the Order of June 15th. They have defined the area of the proposed undertaking's potential environmental impact, attempted to identify eligible properties that may be affected by the project, consulted with the SHPO as to the effect of the undertaking on two listed properties in the region, and have considered the eligibility of the San Francisco Peaks for National Register listing. The Court finds there to be no abuse of discretion on the part of the Forest Service as to any of these determinations. The SHPO concluded with the Forest Service's finding that the proposed project will have no direct or indirect effect on the factors which qualified the two listed properties

for inclusion in the National Register, and the Court finds nothing in the record which merits rejecting this determination.

As for the determination regarding the eligibility of the Peaks themselves for inclusion, the plaintiffs claim that because a "question" exists as to whether the Peaks are eligible, the defendants are required to have the "question" resolved by the Secretary of the Interior pursuant to 36 C.F.R. § 800.4 (a) (3). However, the regulations clearly state that "a question . . . exists when the agency and the State Historic Preservation Officer disagree or when the agency determines that a question exists." 36 C.F.R. § 1204.2(c). In this case, the Forest Service and the SHPO agree that the San Francisco Peaks as an entity are not eligible for listing on the National Register and the Forest Service had not otherwise determined that a question exists. Clearly there was no obligation to refer the matter to the Secretary of the Interior; the regulation was obviously intended to provide a means of either resolving a dispute or providing a further determination should the agency find it necessary.

The plaintiffs also challenge the substance of the Forest Service's finding that the Peaks are ineligible for inclusion in the National Register. They cite to several other mountains that have been listed and argue that the Forest Service acted in an arbitrary and capricious manner in exercising its discretion as to this matter.

However, as the defendants point out, what qualifies an area for listing is a combination of unique attributes which in this instance the Forest Service did not find to be present. The regulations provide that properties "used for religious purposes" ordinarily should not be listed in the National Register unless they are "(a) A religious property deriving primary significance from architectural or artistic distinction or historical importance . . . [or] (f) a property primarily commemorative in intent if design, age, tradition or symbolic

value has invested it with its own historical significance.”  
36 C.F.R. § 1202.6.

The defendant did not find the Peaks, as an entity, to fit into any of the exceptions, nor did they find the Peaks to fall within any of the categories of properties eligible for inclusion in the National Register set forth in 36 C.F.R. § 1202.6 (districts, sites, buildings, structures and objects). The administrative determination here is of course entitled to great deference:

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

*Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). There is no evidence that this discretion has been abused and accordingly the Court will not disturb it.

#### *Rules 59(e) and 60(b) Motions*

Plaintiffs have moved, pursuant to Rules 59(e) and Rule 60(b), to have this Court modify its Order of June 12, 1981, with respect to plaintiffs' claims under the First Amendment, the American Indian Religious Freedom Act, the National Environmental Policy Act, the alleged trust duty owed by the defendants to the plaintiffs, and the Endangered Species Act.

In order to succeed in modifying a previous judicial rule pursuant to Rule 60(b), the plaintiff has a very heavy burden to meet. They must

(1) show that the “newly discovered evidence” was not and would not by due diligence have been discovered in time to produce it at trial;

(2) show that the alleged "newly discovered evidence" would not merely be cumulative; and

(3) show that the "newly discovered evidence" would probably lead to judgment in the movant's favor.

*Philippine National Bank v. Kennedy*, 295 F.2d 544, 545 (D.C. Cir. 1961). Plaintiffs herein claim that pursuant to a deposition which was taken of Forest Service Archeologist Peter Pilles, they have "newly discovered evidence" regarding fir bough collecting on the San Francisco Peaks near the Snow Bowl road, as well as an alleged Hopi Shrine located in the vicinity of Agassiz Peak outside the Snow Bowl permit area. Plaintiffs argue that this information was not revealed to them prior to the Court's ruling on June 12, 1981, and that they are now entitled to judgment in their favor based upon this new evidence. The Court disagrees for several reasons.

First, the Court is not convinced that this constitutes "newly discovered evidence" in light of the fact that the federal defendants have recognized from the outset of this action that bough collecting practices occur in the fir zone of the San Francisco Peaks including the west side. See Levy affidavit submitted with defendants' cross-motion for summary judgment ¶ 11. Additionally, federal defendants have stipulated to the existence of Hopi shrines throughout the San Francisco Peaks. See Joint Stipulation of Material Facts No. 26.

Secondly, even if plaintiffs did not previously know of these specific sites, it could easily have been discovered by plaintiffs prior to the Court's ruling on June 12, 1981. Who should know better where Indian religious sites exist than the plaintiffs themselves? The plaintiffs apparently did not engage in any discovery on this issue prior to the Court's summary judgment ruling, and they specifically agreed to the resolution of this case on the merits based on written submissions. If, in fact, there were areas that the plaintiffs considered "sacred" that should have been brought to the Court's attention, clearly the plaintiffs



could have obtained that information through due diligence. The burden of proof is not on the defendant to show an absence of religious sites, but is on the plaintiffs to show the presence of such and the resulting burden on their religious practices. Plaintiffs did not meet this burden when they were previously before the Court and, therefore, they will not be allowed to relitigate the issue at this point.

Thirdly, the revelation of this "new evidence" would not alter the Court's decision regarding the First Amendment or American Indian Religious Freedom Act claims. This Court concluded in its June 15, 1981 Memorandum Opinion that the expansion of the Arizona Snow Bowl would impose no burden on the practice of plaintiffs' religion. The Court held that the defendants had not forced plaintiffs "to embrace any religious belief or to say or believe anything in conflict with their religious tenets; nor have they forced plaintiffs to choose between their religious beliefs and some public benefit." Memorandum Opinion at 9. The fact that there are two bough collecting sites, which appear to be temporary in nature, within 70-100 feet of the Snow Bowl access road, does not make this permit area central or indispensable to the practice of plaintiffs' religion. Additionally, as the Court previously pointed out, plaintiffs can still collect fir boughs in these areas should they chose to do so; the Snow Bowl operation had been in existence for nearly fifty years and it appears that the plaintiffs' religious practices and beliefs have managed to coexist with the diverse development that has occurred. As long as the Indians have continued access to the Peaks, the Snow Bowl will not impinge upon the continuation of all essential ritual practices. See Memorandum Opinion at 9.

The plaintiffs also attempt to have the Court alter its judgment pursuant to the National Environmental Policy Act (NEPA), the alleged trust responsibility and the Endangered Species Act (ESA) claims. However, the Court finds these arguments to be repetitious and will not engage in a restatement of

its previous decision. The qualifications of Mr. Pilles were known to the Court prior to its ruling and do not merit the Court altering its determination under NEPA. Similarly, the decision on remand in *United States v. Mitchell*, 664 F.2d 265 (Ct. Cl. 1981) in no way changes this Court's determination that no special trust responsibility exists by any treaty, statute or executive order in this case where the land in question is part of the National Forest system. Thirdly, this Court's holding that a species must be "listed" to be protected by the ESA is not altered by the fact that *Senecio Francisco* may be listed in the future; the plaintiffs may not invoke the protections of the Act until such a listing occurs.

In viewing of the foregoing, the Court finds that the plaintiffs have not met their burden of proof under Rule 60(b) or Rule 59(e). The Court will not engage in a restatement of its ruling on June 12th which plaintiffs are obviously encouraging the Court to do. Accordingly, the plaintiff's motions must be denied.

An Order in accordance with the foregoing shall be issued of even date herewith.

Charles R. Richey  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-0481

THE HOPI INDIAN TRIBE,

*Plaintiff,*

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,

*Defendants.*

---

Civil Action No. 81-0493

NAVAJO MEDICINEMEN'S ASSOCIATION, *et al.*,

*Plaintiffs,*

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*,

*Defendants.*

---

Civil Action No. 81-0558

RICHARD F. WILSON, *et al.*,

*Plaintiffs,*

v.

JOHN R. BLOCK, Secretary of Agriculture, *et al.*

*Defendants.*

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ORDER

Upon consideration of the defendants' motion for entry of final judgment and the plaintiffs' motions for relief from judgment and in accordance with the Memorandum Opinion issued of even date herewith, it is, by the Court, this 14th day of May, 1982, hereby

ORDERED that the defendants' motion be, and the same hereby is, granted; and it is

FURTHER ORDERED that the plaintiffs' motions be, and the same hereby are, denied; and it is

FURTHER ORDERED that final judgment be, and the same hereby is, entered for the defendants; and it is

FURTHER ORDERED that the injunction which was issued in this action be, and the same hereby is, removed.

Charles R. Richey  
United States District Judge

## **APPENDIX "D"**

**Forest Supervisor's Decision  
Dated February 27, 1979**

### **RECORD OF DECISION**

**Arizona Snow Bowl Ski Area Proposal  
and  
Snow Bowl Road**

**Final Environmental Statement  
03-04-78-01**

**Coconino County, Arizona**

**USDA - Forest Service  
Coconino National Forest**

The basic decisions are:

1. Whether to remove the Snow Bowl Ski Area facilities or to continue operation and allow further development within the Snow Bowl permit area.

2. Select a standard of improvement for the Snow Bowl Road.

The Forest Service devised the preferred alternatives for the Arizona Snow Bowl and Road based on the following considerations.

### *Legal Requirements*

A Draft Environmental Statement filed on June 23, 1978, and a Final Environmental Statement, when filed with the Environmental Protection Agency, will fulfill the requirements of the National Environmental Policy Act of 1969 to use an interdisciplinary approach with public involvement in making this decision.

The American Indian Religious Freedom Act signed on August 11, 1978, by President Carter, states it shall be the policy of the United States to protect and preserve for American Indians, their inherent right of freedom to believe, express, and exercise their traditional religions. This includes, but is not limited to, access to sites; use and possession of sacred objects; and the freedom to worship through ceremonials and traditional rites. The Act directs evaluation of policies and procedures in consultation with native traditional leaders.

The Act does not require that access to all publicly owned properties or sites be provided without consideration of other existing or potential uses or activities; nor does it require that native traditional religious considerations always prevail to the exclusion of all other considerations. Traditional Indian religious practices will be allowed within the Snow Bowl permit area.

The Forest Service has met the requirement of consultation with native traditional religious leaders. In the preparatory stage of the Draft Environmental Statement, the public, including tribal leaders and native traditional religious leaders, were notified of all public involvement activities and invited to provide input. Public meetings, many scheduled specifically to encourage input from tribal leaders and native traditional religious leaders, allowed oral statements. Written statements were also encouraged. Traditional leaders who wrote to the Forest Service or presented oral statements identified an issue concerning Indian religious freedom and provided substantive background information on the traditional Indian religious practices within the San Francisco Peaks area.

The principal issue raised by Native American traditional religious leaders is that some of their supernatural beings live in the sacred mountains and have given the Indian people responsibility to protect their home from destruction. Traditional religious leaders believe that if they do not protect the sacred mountains, the supernatural beings will not look favorably on the people and natural disasters will result. The position of most Native American traditional religious leaders is that all land uses on the sacred mountains that are commercial or require construction, should be removed.

The legal requirements of the National Environmental Policy Act of 1969, the American Indian Religious Freedom Act and other laws, have been met.

### *Public Sentiment*

There is intense public sentiment for both development and removal of the Snow Bowl facilities. During the public review period for the Draft Environmental Statement, the Forest Service received 1,360 inputs including 104 oral statements and 1,256 written statements representing 8,841 people. Overall, 76 percent of the people who responded favored development;



12 percent favored removal; 2 percent favored leaving the area "as is"; and 10 percent did not express an opinion.

Individual letters most frequently favored development. Of the 1,113 people who signed individual letters, 55 percent favored development, 17 percent favored removal, 14 percent favored leaving the area "as is", and 14 percent did not express an opinion.

The majority of people who commented seemed to take a polarized view. The issue was debated by many from a viewpoint of "growth versus no growth" of the Flagstaff community. People favoring no development used environmental effects and the traditional Indian religion as a point of debate. People who favored development showed concern for the economy of Flagstaff and the continuance of recreational skiing.

The Snow Bowl Road was mentioned by 5 percent of the people providing input. Road C was favored most frequently.

The predominance of total public input shows the public favors development.

### *Environmental Effects*

The review of environmental factors, including snowfall, indicates the Snow Bowl permit area is a suitable place to provide a quality skiing experience. Environmental effects of new clearing for ski runs on the upper slopes would be difficult to mitigate. Of special concern is protection of proposed threatened and endangered plants, the alpine tundra above the ski area, and minimization of adverse visual effects. A level of development beyond what exists now can be accomplished with environmental impacts mitigated to an acceptable level by close attention to design, construction, and maintenance requirements.

### *Effects on Local Economy*

There would be a one time cost to the Federal Government of about \$700,000 if the existing facilities were to be removed. The Flagstaff area community would lose between \$300,000 and \$1,500,000 annually in total direct expenditures based on the last five year skier days if the facilities were removed.

Economic effects of removing the facilities are unfavorable to Flagstaff.

Direct annual expenditures in the Flagstaff community would be between \$581,000 and \$2,099,000 depending upon the level of development permitted. Direct annual employment at the Snow Bowl would be between 121 and 374 jobs. Direct spending for construction of new Snow Bowl facilities would be between \$492,000 and \$1,310,000.

Economic effects of development are considered a benefit to Flagstaff.

### *Forest Service Plans and Policies*

The San Francisco Peaks Land Use Plan, approved July 23, 1974, allocates the Snow Bowl permit area to winter sports development.

The Final Environmental Statement for the San Francisco Peaks Land Use Plan, filed December 1, 1972, documents plans for the Snow Bowl Road to be two lane, all-weather surfaced.

It is Forest Service policy to provide a variety of quality recreation opportunities, including skiing, on suitable sites. Quality skiing includes a balance of slope distribution for beginner, intermediate, and advanced skiers; and a balance of facilities including lifts, lodge, and parking.

The proposed development of the Arizona Snow Bowl for skiing would implement previous planning and is consistent with Forest Service policy.

*Preferred Alternatives*

After considering all effects, the Forest Service prefers development because legal requirements have been met; public sentiment favors development; environmental effects can be mitigated; it benefits the local economy; and is consistent with Forest Service plans and policies.

The Forest Service finds it possible, by upgrading ski lift capacity, to accommodate a comfortable carrying capacity of 2,825 skiers while achieving a balance of facilities and slopes with significantly less disturbance to the environment than the proposed Master Concept Plan.

The Forest Service recognizes that to some, development will be considered adverse to Native American religious beliefs because commercial use and construction are not consistent with protecting the home of their supernatural beings; however, the Forest Service finds public use of the Snow Bowl area and the goods and services the public derives from the San Francisco Peaks area are a substantial and compelling reason for continuance and improvement of the development. The Forest Service will not deny access to sites or prevent use and possession of sacred objects; and will allow American Indians the freedom of worship, through ceremonies and traditional rites, within the Snow Bowl permit area.

The Forest Service has recommended the undeveloped portion of the San Francisco Peaks area, which includes about 14,650 acres or approximately one-fourth of the San Francisco Peaks, be designated a component of the National Wilderness Preservation System. This area of land will remain undeveloped, retaining its primeval character with the influence of man's work substantially unnoticeable.

The Forest Service has decided on a level of development which must respond to the following guidelines:

1. Each improvement must be analyzed using the environmental assessment process when engineering and technical designs are prepared to determine environmental and economic feasibility.

2. Possible adverse environmental effects on the visual resource, threatened and endangered plants and alpine tundra, must be properly mitigated.

3. The development alternative for the Snow Bowl permit area must provide quality downhill skiing. The environmental changes must be acceptable. Development will be phased to meet public demand. The economy of the Flagstaff community must not be adversely affected.

4. The preferred road development alternative must safely handle the expected traffic and be an all-weather surfaced, two-lane road built with minimum disturbance of the land. The road must be acceptable to Coconino County for inclusion in their road system, create the least amount of dust, and be easy to maintain.

#### *Description of the Preferred Alternatives*

1. The Forest Service prefers development of the Arizona Snow Bowl permit area to provide quality downhill skiing. In order to achieve this goal, the Snow Bowl permit area may be developed as follows:

- a. A new day lodge may be constructed adjacent to the existing picnic area. The existing day lodge will continue to be maintained with improved restroom facilities. The total lodge capacity will be sized to accommodate one-third of the comfortable carrying capacity of the ski area.

- b. The existing chairlift (Lift No. 1) may be reconstructed on the same alignment with the upper terminal located at approximately 11,500 feet elevation. This will lower the elevation of the upper terminal. The chairlift

capacity may be increased when reconstructed but should be in balance with skiable slopes.

c. Portable surface lifts may be used above the tree line, for skier access to the upper bowl, when conditions are suitable at the upper terminal of Lift No. 1.

d. New lifts numbered 3, 4, and 7, as shown on the maps, may be constructed. Lifts numbered 5 and 6, as proposed in the Master Concept Plan, will not be constructed. The existing Poma lift may be moved to the Agassiz ski trail for use by the ski school. New Chairlift No. 2 may be constructed on the existing Poma alignment and extended up to approximately 10,450 feet elevation.

e. A shuttle system from U.S. Highway 180 to the ski lodge will be provided to accommodate at least 50 percent of comfortable carrying capacity.

f. Parking lots will be maintained or constructed to accommodate approximately 670 skier cars, 19 buses, and up to 100 employee cars. This will require about 8.1 acres of parking.

g. Comfortable carrying capacity will be 2,825 skiers at one time. This includes upgrading Chairlift No. 1.

h. No new runs will be constructed above approximately 10,950 feet elevation; but maintenance and minor improvements of existing runs above 10,950 feet will be allowed.

i. There may be 50 acres of new ski run clearing and 4 acres of new ski runs in natural openings to bring the skill area balance to:

Beginner – 27 percent or 55 acres

Intermediate – 36 percent or 75 acres

Advanced – 37 percent or 76 acres

j. No runs will be constructed outside of the existing permit area.

2. The Forest Service prefers improvement of the Snow Bowl Road to a 20-foot wide paved travelway with 4-foot paved shoulders. A road of this width will require the use of a shuttle system to handle at least 50 percent of the skiers at comfortable carrying capacity. No other traffic controls are necessary, but chains or four-wheel drive vehicles may be required depending upon road conditions. A shuttle system is included in the preferred alternative to reduce the need for parking in the Snow Bowl permit area and to limit road width. The road alignment follows Road B to minimize the disturbance of land. The road width of 28 feet was selected because that is the minimum width acceptable to the Coconino County Highway Department and necessary to handle the projected traffic safely. Paving was selected because it creates less dust, requires less surfacing material over time, and is cheaper to maintain.

The preferred alternatives as presented in a Final Environmental Statement and summarized here are the Forest Service decision. The preferred alternatives may be implemented 30 days after the date the Final Environmental Statement is filed with the Environmental Protection Agency. The 30 day waiting period is not a public response period. It is a time for the public to become aware of the decision before it is implemented.

Sincerely,

**MICHAEL A. KERRICK**  
Forest Supervisor and Responsible Official  
Coconino National Forest

## **APPENDIX "E"**

**Regional Forester's Decision**

**Dated February 7, 1980**

**REGIONAL FORESTER'S DECISION**  
**on**  
**REQUEST FOR ADMINISTRATIVE REVIEW**  
**of**  
**FOREST SUPERVISOR'S DECISION TO EXPAND**  
**ARIZONA SNOW BOWL SKIING FACILITIES**  
**COCONINO NATIONAL FOREST**

This appeal comes to me as provided by the regulations of the Secretary of Agriculture, 36 CFR 211.19, wherein anyone who disagrees with an administrative decision of a Forest Service officer may request administrative review. This appeal involved 101 appeals and 11 interventions that were timely filed.

On February 27, 1979, Coconino Forest Supervisor Michael A. Kerrick issued a Final Environmental Statement (FES) and Record of Decision which would permit the expansion of the Arizona Snow Bowl Ski Area within the existing permit area. This decision followed a long period of ski area master planning by the permittee, and environmental study and public involvement by the Forest Service.

The preferred expansion decision was chosen from seven alternatives which ranged from elimination of the ski area to total development of the ski area, as proposed by the permittee's master plan. In addition, a separate set of five alternatives were considered regarding improvement of the access road to the ski area. The road improvement decision was to reconstruct the road to a 20-foot paved travelway with 4-foot paved shoulders.

On March 16, 1979, the first request for administrative review and stay of implementation was received by the Forest Supervisor. By April 12, 1979, the last request for intervention



had been received. Within that period of time 112 requests for administrative review and for intervention were received.

On March 30, 1979, I granted a stay of implementation of the Forest Supervisor's decision which would remain in effect until I issued my decision. In the requests for administrative review and/or statement of reasons, 15 appellants and intervenors requested the opportunity to present their views to me orally. On April 19 and 25, 1979, I granted oral presentation to those who had properly requested it and established the procedures for the oral presentations. On May 4 and again on May 14, I received requests for administrative review of my procedural decision on the conduct of the oral presentations which were sent to the Chief of the Forest Service. A stay of implementation of the oral presentations was granted by the Chief of the Forest Service so the oral presentations were postponed pending resolution of the procedural appeal.

On June 4, 1979, my Responsive Statement to the procedural appeals was issued and then comments from the appellants were received. On August 23, 1979, the Chief issued a decision upholding the procedures I had established. On reviewing the record, I agreed to change the location of the oral presentations from Albuquerque, New Mexico, to Flagstaff, Arizona. The Secretary of Agriculture declined to review the Chief's decision and on September 7 the oral presentations were rescheduled for October 2-4, 1979, in Flagstaff.

A verbatim transcript of the oral presentations was taken, reviewed by the presenters, and the administrative review record was closed and was received from the Forest Supervisor on November 29, 1979.

This review was too complex to make a decision within 30 days of receiving the record so all parties to the appeal were informed that additional time would be needed to reach a decision.

### *The Review Record*

The record of this appeal requires approximately 5 linear feet of file space and includes all the documentation leading to Supervisor Kerrick's decision, the material received regarding the appeals and interventions of the ski area expansion, the procedural appeals, and the oral presentations, and anything else received up to November 21, 1979, when the record was closed.

One hundred ninety seven cards and letters; eight separate statements of reasons; 83 supporting documents, briefs, appendices, exhibits, etc.; and about 16,000 signatures on petitions have been received expressing opinions about Supervisor Kerrick's decision. In considering the mass of opinion that has been submitted, I have not "counted votes." Instead, all the submissions have been read and weighed, and opinion is strong in opposition to expansion. In addition, opinions have been subjectively judged as to the quality of their rationale, legal foundation, and the fairness to all parties involved.

The oral presentations in October 1979 provided 15 appellants and intervenors the opportunity to present their views orally. The opportunity to hear these views and opinions was very much appreciated and was quite valuable. The tremendous amount of opinion obtained person to person enabled me to better grasp the facts of this appeal, as well as to understand the depth of the feelings that are involved. It provided the catalyst that was needed to synthesize the reams of written material which have been received.

From the record, nine points of appeal have been identified which I believe require a response.

1. *The expansion of the Arizona Snow Bowl would violate statutory and constitutional rights of Native Americans to practice their Religion.*

*Comment*

Appellants and intervenors have made excellent arguments for both sides of this point. I have studied this question exhaustively from every angle and there is a more thorough review in the *Discussion* section of this decision. I conclude that the expansion could violate the rights of American Indians to practice their religions. However, removal of facilities or maintenance of the status quo to correct the above possible violation could also violate the rights of the ski area permittee and the right of the American public to a government that does not favor one religion over another. The dilemma presented by this situation and the conclusion drawn from it are discussed later in this decision.

2. *The expansion of the Arizona Snow Bowl would violate the Endangered Species Act of 1973.*

*Comment*

The FES provided that the two species of plants found on the area, that might potentially be on a final Federal Threatened and Endangered Plant list, would be given full consideration. The United States Fish and Wildlife Service (USF&WS) was satisfied with the consideration given and the proposed course of action. The Forest Supervisor proposed to develop a plan in conjunction with the USF&WS to protect any listed plant species found within the area.

There has been no violation of the Endangered Species Act, nor would any undertaking at the Arizona Snow Bowl likely result in a violation. At this time, it is not known if the two plant species under discussion are even threatened or endangered.

3. *Public involvement in the decision-making process was improperly displayed so as to favor expansion of the Arizona Snow Bowl.*

*Comment*

The Forest Supervisor's decision to allow expansion of the Snow Bowl was made in response to an application for expansion by the ski area permittee. The decision was made on the basis of the findings in the FES that the modified expansion proposed by the Forest Supervisor would not have an undue effect on the human environment. While public sentiment for or against such expansion is a factor in the decisionmaking process, the decision must necessarily consider all factors, which need not be enumerated here. The decision was not thrown out to be voted on. The Forest Supervisor is in the position of having to exercise the proprietary right of the Federal Government in the management and administration of its land. He must make many decisions that fail to please one or more of the "publics" that have an interest in a given matter.

In his response statement, the Supervisor points out some of the problems inherent in such "vote counting." How many American Indians can a religious leader claim to speak for? How many skiers does the representative of a skier's association represent? Are the geographic boundaries in which such publics are found limited to the area around the Peaks? Is it statewide or is it of national interest? These rhetorical questions merely point up the dilemma. In the long run, the best information is that which comes when someone cares to speak out or provide his views in writing. At that time, the Supervisor's reading of all responses was that the majority favored expansion, and I have seen nothing that would lead me to conclude that he misread the information he received. However, the Supervisor's decision, and the decision I have made were not based on "votes."

4. *The expansion of the Arizona Snow Bowl violates the National Environmental Policy Act of 1970.*

*Comment*

To a large extent this point is intertwined with most of the other charges made in the appeal. According to case law, an FES serves two purposes. First, it requires decisionmakers to examine and consider environmental factors before acting. Secondly, it acts as an environmental full disclosure statement permitting other officials, Congress, and the public to evaluate the environmental consequences on their own. See *State of California v. Bob Bergland et al.* (Eastern Circuit of California 1980, Civil No. S-79-523). I have thoroughly reviewed the FES, the information in the written record, and that supplied at the oral presentations. The Environmental Protection Agency (EPA) found that the FES was adequate.

I have concluded that the Forest Supervisor took a "hard look" at the environmental consequences of the action (see *Kleppe v. Sierra Club*, 427 U.S. 390 (1976); and that he has complied with the National Environmental Policy Act of 1970.

5. *The trust and fiduciary duty owed to Native Americans was violated by the Forest Supervisor.*

#### *Comment*

The National Forests were established by the Organic Administration Act of June 4, 1897, to improve and protect the Forest within the boundaries, or to secure favorable conditions of water flows, and to furnish a continuous supply of timber. Later acts have expanded the purposes of the National Forests. The Forest Service as an agency is charged with administering and managing the National Forests in accordance with applicable laws. On the other hand, there are agencies that have been given direct and indirect responsibilities toward Native Americans in various ways. The trust and fiduciary duty owed to Native Americans by the Federal Government as a whole is well established. However, the implied duty of the Forest Service as a part of the Federal Government is not so clear and is particularly obscure in this case. The Forest Service

intent is to do its duty toward any segment of society that has an interest in the National Forests. I believe that no trust and fiduciary duty with regard to Native Americans has been violated. They were consulted and their views are given considerable weight.

With specific reference to the entire San Francisco Peaks, Forest Service actions have historically been such that any trust and fiduciary duty has been fully met. Without the Forest Service and its programs the Peaks, including the very summits of Mt. Humphries and Mt. Agassiz, could be in non-Federal ownership and Indians could very well be barred from entry by the owners of the land. Establishment of the National Forests and aggressive land acquisition programs have retrieved critical areas of the Peaks for public ownership. At one point, about two-thirds of these critical areas were in non-Federal ownership.

Other actions by the Forest Service have served to ensure the naturalness of the Peaks. A large area is protected as the San Francisco Peaks Research Natural Area. Still more is included in the C. Hart Merriam Scenic Area, and there is another area withdrawn as the Lockett Meadow Recreation Area.

Between these areas is an area mostly within the Inner Basin that is protected as the City of Flagstaff Watershed. Beginning in the early 1960's and up to the present there were written into multiple-use and land-use plans various requirements to preserve the scenic qualities of the Peaks. In addition, the potential of part of the Peaks for wilderness was recognized in the RARE I inventory which was carried over into RARE II. Over the years, grazing by livestock and logging activities have been restricted.

There is one conclusion to this. If not for Forest Service programs to acquire land and consolidate Federal ownership on the Peaks and its environs, and to ensure special designations and administrative prescriptions for the protection of natural conditions, the Indian religions would be immensely impacted and individuals of all beliefs could have been prohibited from

entering onto much of the mountain and the mountain itself might have a greatly changed aspect.

*6. The Forest Supervisor has failed to comply with the National Historic Preservation Act and Executive Order 11593, or alternately the expansion would violate that Act and Executive Order.*

*Comment*

The Forest Supervisor reviewed this point rather thoroughly in his Responsive Statement and his findings are correct. Those appellants who raised this point have misinterpreted the laws and regulations dealing with historic preservation and, in fact, have shown little knowledge of the procedures.

Aside from the obvious mixup in National registers, their lack of understanding of when a project becomes an "undertaking," and other misinterpretations of the 36 CFR 800 regulation, I believe there has been full compliance with procedures up to this point. The Forest Supervisor's decision to expand does not of itself violate either the National Historic Preservation Act or Executive Order 11593. They would be violated only if the Forest Service failed to follow the procedures outlined in 36 CFR 800. Essentially these procedures require:

- a. An inventory of sites or properties.
- b. A determination of eligibility for nomination to the National Register of Historic Places.
- c. A determination of effect.
- d. A plan to mitigate any adverse effect.
- e. Consultation with the Arizona State Historic Preservation Officer and the Advisory Council at appropriate stages.

The initial actions of consulting the register and perusing lists of known sites were taken. There would be a detailed survey required prior to any development (i.e., the "undertaking").

I find that the Act and Executive Order have not been violated.



7. *The procedure of issuing a term special-use permit for permanent improvements and an annual special-use permit for ski slopes and trails exceeds the authority of the Forest Supervisor.*

*Comment*

This point is dismissed from the appeal. The issue under appeal in no way relates to the legality of the existing permits. Those permits were issued on April 15, 1977, and the period during which an appeal could have been taken against the issuance of the permits has long since lapsed.

In addition, I am without authority to provide any relief on this point because the procedure of issuing two permits is prescribed in the Forest Service Manual at 2726.61a by the Chief of the Forest Service as standard procedure for Service-wide use.

8. *The expansion of the Arizona Snow Bowl would violate the Multiple Use-Sustained Yield Act of 1960.*

*Comment*

I cannot agree that the Multiple Use-Sustained Yield Act would be violated by the expansion of the Snow Bowl.<sup>1</sup> The decision to allow expansion was made after giving due consideration to the relative values of the various resources of the area, as required by the Act. The Act provides for periodic adjustments in use to conform to changing needs and conditions. Multiple use has never meant that all uses will be there in equal

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<sup>1</sup>Some authorities believe the Multiple Use-Sustained Yield Act is not conducive to violation. The Act recognizes that the mix of uses will not be in balance and will be ever changing. Courts have held that the Secretary of Agriculture has absolute discretion for making judgments on the proper mix of uses (see *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970) and *Sierra Club v. Harden*, 325 F. Supp. 99, 123 (D. Alaska 1971)). The plaintiffs in many lawsuits have charged the Forest Service with violation of the Act but the courts, so far as can be determined, have preferred to sidestep the question by deciding issues on other grounds. A recent example is the January 3, 1980, decision in the Eastern District of California (*State of California v. Bob Bergland et al.*, *supra*).

amounts or that all of them will even be present on a particular area.

The Multiple Use-Sustained Yield Act actually specifies that the National Forests are to be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. Section 2 of the Act refers to these as renewable surface resources. It appears inappropriate to try to administratively expand the meaning of an Act dealing with the renewable surface resources to include nonresource uses.

9. *The expansion of the Arizona Snow Bowl would violate the Wilderness Act of 1964.*

#### *Comment*

Some appellants assert that a Colorado case, *Parker v. United States*, *supra*, applies here. In that case, the court held that land potentially suitable for wilderness lying contiguous to an *existing* wilderness must be studied for possible inclusion in wilderness before the Forest Service took any action adverse to that wilderness character. That is not the case here.

The ski area is already developed. The expansion, which is at issue as a possible violation of the Wilderness Act, would take place within an existing developed ski area. It is usually recognized by wilderness proponents, planners, and managers alike that the wilderness values at such a developed area are already foregone.

In the case of the Arizona Snow Bowl, the major modification from wilderness conditions is the existence of artificially cleared ski trails and slopes, through a predominantly solid spruce-fir forest. Even if all physical improvements were removed, the ski area would be discernible for a very long time.

By any measure of eligibility, a developed ski area is simply not a candidate for wilderness designation.

In brief, a developed area lying contiguous to an area administratively identified as suitable for wilderness designa-

tion does not fall within the principles enunciated in *Parker v. United States*.

### *Discussion*

Various appellants have asserted that the Forest Service has violated or would violate several laws with the proposal to allow expansion of the Snow Bowl. These claims are discussed under the individual points of appeal and, as the comment on each indicates, I do not believe any law of the laws mentioned has been or would be violated. To a great extent many appellants have used a scatter-gun approach to this appeal by making numerous charges in their opposition to the Snow Bowl expansion. I must reject statements that such acts as the National Environmental Policy Act, the Multiple Use-Sustained Yield Act, the Endangered Species Act, the National Historic Preservation Act, and the Wilderness Act have been or would be violated.

The central issue has always been the effect of expansion on Indian religions. The American Indian Religious Freedom Act, 42 USCA 1996, has figured prominently in this appeal. This short Act was passed in 1978 as a Joint Resolution and, on its face, appears to be a rather simple policy statement by the Congress. The pertinent portions of the Act are as follows:

... it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites,

and

The President shall direct the various Federal departments, agencies, and other instrumentalities responsible for admin-

istering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices. Twelve months after approval of this resolution, the President shall report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action.

There are no court precedents involving this Act, although a case involving Tellico Dam is before the Sixth Circuit Court of Appeals. In addition, to the rather plain language of the Act, the legislative history seems to indicate that, contrary to the beliefs of several appellants, the purpose of the Act is fairly uncomplicated.

For instance, Representative Udall who was sponsor of the legislation said:

Mr. Speaker, this bill just requires the President to direct the various Federal departments and agencies to evaluate their laws and regulations to see where they may adversely impact of (sic) the first amendment right of Indian people to practice their traditional religion. Where administrative changes can be made, consistent with the enabling legislation, to eliminate unwarranted restrictions on Indian religion, the bill intends the appropriate changes be made. Where the underlying law is determined to be the reason for such restrictions and these restrictions are determined to be unwarranted and unnecessary, the bill contemplates that the President, in his report to the Congress, would request appropriate legislative changes.

He also said of his bill:

Mr. Speaker, it is not the intent of my bill to wipe out laws passed for the benefit of the general public or to confer special religious rights on the Indians . . . It is the intent of this bill to insure that the basic right of the Indian people to exercise their traditional religious practices is not infringed without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration.

Later in the debate he said:

All this simple little resolution says to the Forest Service, to the Park Service, to the managers of public lands is that if there is a place where Indians traditionally congregate to hold one of their rites and ceremonies, let them come on unless there is some overriding reason why they should not . . . It simply says to our managers of public lands that they (Native Americans) ought to be encouraged to use these places. *It has no teeth in it.* It is the sense of the Congress. (Emphasis added.)

Mr. Udall also introduced into the record a letter from the Department of Justice stating "that it is the Department's understanding that this resolution, in and of itself, does not change any existing State or Federal law. That, of course, is the committee's understanding and intent."

Mr. Roncalio, a member of the Committee, stated: "I hope we can keep an open mind long enough to realize that it *is not conveying any right to anybody.*" (Emphasis added.)

It soon becomes obvious in reading the legislative history that the proponents of the Act did not consider the Act completely overriding when there is conflict with another activity. Mr. Udall himself had a way of downplaying the bill. At one point he said:

*It simply says to our managers of public lands that they ought to be encouraged to use these places. It has no teeth in it. It is the sense of the Congress. (Emphasis added.)*

And later in reply to a question as to why no hearings were held on the bill:

*It just seemed so simple and so self-evident that it was merely a statement of policy . . . (Emphasis added.)*

Representative Risenhoover (Oklahoma) further clarified the purpose of the bill thusly:

All this bill does is assure the Indian people the right to practice their religion on public property, on Federal property.

And later:

This is simply a resolution for the preservation of the freedoms of the American Indian to practice their various religions.

Based on a reading of the Act itself, its legislative history, and the absence of court interpretation, I conclude that it means literally what it says and that it did not confer any additional rights to Indians beyond those rights guaranteed by the First Amendment. No laws pertaining to the National Forests were repealed or modified.

I am, however, greatly concerned over the constitutional questions involved. Appellants assert the expansion of the Snow Bowl would violate Indian First Amendment rights to practice their native religions. There seems to be no doubt that the Indian beliefs regarding the Peaks are sincere and are an important part of their religions. Therefore, it may be reason-

able to assume that the First Amendment protection due the Indians extends to the mountain itself, and that expansion could violate those First Amendment rights.

Thus, viewed at least from the standpoint of the right to the free exercise of religion, any of the alternatives in the FES that allow expansion of the ski area could infringe on First Amendment rights. However, the First Amendment is a two-edged sword. It also has the so-called establishment clause which provides that "Congress shall make no law respecting an establishment of religion . . ."

Some proponents of expansion point out that the American Indian Religious Freedom Act, when taken in conjunction with the First Amendment free exercise clause, could be construed as a violation of the First Amendment establishment clause. There have been cases where the court pointed out that claims that the right to free exercise of a religion were impinged ran a collision course with the prohibitions of the establishment clause (see *O'Malley v. Brierly*, 477 F. 2d 785 (3rd Cir. 1973)).

It is possible, therefore, that if the ski area expansion is not allowed in order to accommodate the religious beliefs of Indians, that the Forest Service would be charting a collision course with the prohibitions of the establishment clause. It could be argued that the Forest Service had adopted a policy which favored, aided, sponsored, and protected one religion over nonreligious or secular activity, or other religions.

So far, we have considered only the First Amendment. Other Constitutional issues might also be raised in this case. For instance, some appellants demand complete removal of man-made improvements on the entire Peaks area. This demand could lead to the violation of Fifth Amendment rights regarding the right to full enjoyment of property by the Snow Bowl permittee and other owners of improvements located on National Forest land.

The removal demand could also be a two-edged sword because private property can only be taken for a *public purpose*.



Thus, it would be risky to argue that improvements should be taken by the Government to satisfy the requirements of a religion or that tax money should be used to compensate the owners in furtherance of a religion. It is doubtful that anyone wants to assert that a religion constitutes a "public purpose."

In addition to Fifth Amendment rights to property, every citizen enjoys common law rights to the full use and quiet enjoyment of his property, whether it is personal property or real estate.

The Constitution also contains a property clause that places the control of the public lands with the Congress. Congress has unlimited authority over the public lands and has expressed its sense for the management of the National Forests in a series of laws such as the Organic Administration Act of 1897, the Multiple Use-Sustained Yield Act, and the National Forest Management Act. Thus, I am also vitally concerned with the proprietary rights of the Government in its property; or the right to manage that property.

Because of all these conflicting legal issues, I am presented with a dilemma. Between the possible violation of First Amendment rights to exercise one's religion without restriction, the stricture against the establishment of religions by Governmental action, the impingement of private property rights, and the proprietary rights of the Government in its own land, there seems to be unresolvable conflict. Certainly in this case, the conflicts are apparent.

These competing legal claims may each have a sound basis. Legal advice on the matter is not conclusive as to which points of view have the better merits. Indian religious claims dealing with a whole mountain are new and untested. The Indian Religious Freedom Act is also new and untested. Against this background, it has proven impossible to decide this appeal on legal grounds.

Perhaps the best that one can hope for is to achieve a balancing act between competing Constitutional issues. Thus, it is

possible that the expansion approved by the Forest Supervisor may go too far and would result in a tilt toward development and infringement on the free exercise of religion. Removal of improvements would certainly tilt the other way. Strict status quo would not be in the interest of public safety and would, in the long run, amount to removal as obsolescence sets in.

There is another consideration that has weighed very heavily in my deliberations. The Snow Bowl, while it has been there for many years and is one of very few ski areas in Arizona, is not an outstanding winter sports area when measured against national standards, nor can it ever be made into one. At the same time, there is an increasing demand in Arizona for downhill skiing. It is obvious, however, that no amount of development would make the Snow Bowl into a topnotch area; nor will the expansion approved by the Forest Supervisor or even the permittee's larger proposal provide for all the demand. Where then is a good place to cut off development? I have concluded that a good cut-off place is somewhere near the present size.

Thus, the following decision is based on nonreligious considerations.

### *Decision*

The Forest Supervisor's decision to authorize expansion of the Snow Bowl winter sports area is hereby modified to provide only for repair and replacement of existing facilities as required by obsolescence, public safety and deterioration. This decision does not mean that everything must only be replaced "in kind;" only that additional improvements may not be added except for compelling safety reasons. For example, an existing obsolete lift which is no longer manufactured may be replaced with a modern lift which, in all likelihood, would have a greater uphill capacity because of higher speed and other design improvements. However, a double chair will not be replaced by a triple chair or a gondola, nor will additional lifts or surface tows be added. Improvements or modifications may also be

authorized to take care of environmental concerns. A key criterion for any repair or replacement action will be to minimize change or disturbance. Thus, the contemplated improvement of the access road should be modified to stay within the existing road prism, unless there are specific compelling safety reasons for doing otherwise. However, with appropriate engineering considerations, an all-weather surface may be laid upon the alignment of the existing unstablized road surface.

Clearing or modification of existing ski trails must be restricted. To the greatest extent possible, safety on the trails must be accomplished by marking and signing obstructions and hazards, and by direct administration of the skiing public. The permittee may be allowed to modify his method of operation to achieve better utilization of the existing development, such as by longer hours of operation.

### *Mitigation*

The course of action directed by this decision is not precisely displayed as one of the Alternatives in the FES. This action lies somewhere between Alternatives 2 and 3 and Road A and B. However, I conclude that:

1. A new FES is not required for the replacement, through obsolescence or other reasons, of improvements on an area already allocated to this use. Some work could require an individual assessment of impacts and needed mitigation. For instance, the effects of reopening construction trails.
2. The overall effects of a range of actions are adequately considered in the Forest Supervisor's FES.

One of the primary concerns that the Forest Supervisor addressed with the proposed expansion of the Arizona Snow Bowl was the existing undesirable and unsafe mixture of skiing skill levels. The ski area has both an out-of-balance proportion of beginner/intermediate/advanced acreage, and a poor mixture of skill levels on some ski trails. Without the proposed expan-

sion, this deficiency will remain uncorrected. The area is particularly short of beginner slopes.

Several things can be done to relieve this situation:

1. Inform the skiing public as to the general nature of the opportunities at the Arizona Snow Bowl.
2. Ensure that skiers are aware of the minimum skill level required to descend trails served by lifts at each lower lift or tow terminal. Build in appropriate skill level frictions on the approach to the loading platform.
3. Ensure that skill level signing at all ski trail beginnings, junctions and enroute is adequate.
4. Facilitate studies, EAR's/EIS's, and prospectuses for other possible sites for new ski areas on the Coconino, Kaibab, and Apache-Sitgreaves National Forests, particularly those which offer complementary skill levels to the Arizona Snow Bowl.
5. Facilitate management of nordic skiing and snowplay by the public and private sectors at appropriate sites in Northern Arizona.

Include, in interpretive programs for the Coconino National Forest, an effort to sensitize skiers and other visitors to the San Francisco Peaks to the sacred nature of the mountain and its influence in the religions and cultures of the concerned Indian tribes and pueblos. This should be done in consultation and in cooperation with the Indian religious leaders and the tribal/pueblo governments.

#### *Appeal Rights*

Any party to this appeal that disagrees with this decision may file a request for administrative review by the Chief of the Forest Service. Such request must be filed with me within 30 days of receipt of this decision and must follow the procedures prescribed in 36 CFR 211.19.

**M. J. HASSELL / Regional Forester**

# APPENDIX "F"

Chief's Decision  
Dated December 31, 1980

CHIEF'S DECISION  
on  
REQUEST FOR ADMINISTRATIVE REVIEW  
of  
SOUTHWESTERN REGIONAL FORESTER'S DECISION  
involving  
ARIZONA SNOW BOWL SKIING FACILITIES  
AND THE SNOW BOWL ROAD  
COCONINO NATIONAL FOREST

The parties involved in this administrative review have copies of the Regional Forester's April 21, 1980, Responsive Statement. The Statement describes the basis for the appeal, the history and background, the decision under appeal, the points of appeal, and the requests for relief sought by various appellants. Accordingly, those factors are not repeated here.

In my review of this case, I have found two pervasive issues which underlie the grievances of almost all parties to the appeal:

- I. Religious rights of Native Americans.
- II. Suitability of the Arizona Snow Bowl for additional facilities and use.

Although closely related to several of those issues identified and discussed by the Regional Forester, these two are analyzed and dealt with separately due to their overriding importance.

*I. Religious rights of Native Americans.*

The record contains extensive and diverse evidence and arguments on this issue. There is essential acceptance by all parties that the San Francisco Peaks area is considered sacred by Navajo and Hopi people and used by them for purposes of worship.

Appellants speaking on behalf of Native American religious leaders and practitioners contend that development activities on the San Francisco Peaks area which involve soil or vegetation disturbance or commercial activity interferes with the practice of Indian religions. These appellants contend the Forest Service is prevented from permitting such activities on these mountains by reason of the First Constitutional Amendment and the American Indian Religious Freedom Act. They contend the Forest Service must disallow the building of additional facilities within the area currently occupied by the Arizona Snow Bowl. In addition, many feel existing facilities must be removed and skiing use discontinued.

Appellants speaking on behalf of additional skiing facilities argue that no Indian religious rights are infringed by development and use of the area for winter-sports purposes. They contend recreationists have as much right to use the San Francisco Peaks area for secular purposes such as skiing as Native Americans do for religious purposes. They claim denial of construction of additional facilities by the Regional Forester was a religious-based decision and was Constitutionally improper since it has the alleged effect of fostering religion.

The First Constitutional Amendment provides protection to all Americans of the freedom to practice their religion and to believe as they choose. The American Indian Religious Freedom Act reinforces and reiterates that right for Native Americans.

Although closely related, for purposes of analysis and discussion, we have separated the two religious questions; namely, the freedom to *believe* and the freedom to *practice*.

#### *The freedom to believe*

The religious beliefs of Navajo and Hopi people are extensively described and discussed in testimony and affidavits from religious leaders and practitioners. They believe the San Francisco Peaks area is the home of their Gods; that the presence of

skiing facilities and the excavation or construction activity is a desecration of that home, and at some point will drive those Gods away, at which time the Gods will punish the believers for failure to protect the home. They believe should the Gods be so offended, these Gods will no longer bless and protect the believers.

The evidence in the record reflects those beliefs are sincerely held by those who express them.

All members of society may believe as they choose, but the First Amendment provides no assurance that other members of society must behave in conformance with those beliefs. The myriad secular as well as religious beliefs which exist in our society are constantly disturbed by some aspect of institutional functioning of the Nation. An activity which may be compatible with the beliefs of one person is frequently viewed as disruptive to the beliefs of another. Neither the First Constitutional Amendment nor the American Indian Religious Freedom Act assures believers of Native American religions that other members of society must act and behave in conformance with their beliefs.

#### *The freedom to practice*

On this point, religious practitioners, under certain conditions, may have Constitutional protections from acts by other members of society which would infringe upon their rights to worship as they may choose.

The record contains extensive evidence the San Francisco Peaks area is used as a place of worship by Hopi and Navajo people. Practitioners conduct a variety of rites and religious activities at indeterminate locations in the Peaks area, including the collection of natural material and objects considered to be sacred or necessary in religious ceremonies. Religious practices also include placement of offerings and worship at shrines, reciting of prayers and singing of religious songs, and the conduct of healing ceremonies.



In regard to the use of the 777 acre Arizona Snow Bowl tract, the record shows the ski area and the access road are used as a means of access by Indian religious practitioners traveling to sacred locations at higher elevations. Evidence is lacking as to the nature or extent the area under permit is used for worship purposes.

Along with all other members of society, Native Americans enjoy the freedom to practice their religion as they choose. To the same extent and subject to the same reasonable conditions applicable to all other members of the public, Hopi and Navajo people have in the past and may in the future continue to use National Forest land in the San Francisco Peaks and Arizona Snow Bowl area for religious as well as secular purpose.

The record contains no evidence existing or proposed facilities and activities have in the past or are likely in the future to significantly interfere with religious practices of Native Americans.

#### *Summary of findings*

1. Although Native Americans may consider development and use of the Arizona Snow Bowl to be adverse to their religious beliefs, neither the First Constitutional Amendment nor the American Indian Religious Freedom Act provide protection from such development.
2. Evidence does not show that existing or proposed development and use of the Arizona Snow Bowl significantly interferes with religious practices of appellants.

In summary, we find no legally protected religious rights have been abridged as a result of past development and use of the Arizona Snow Bowl and no such rights are likely to be abridged should additional facilities and service be provided at the Arizona Snow Bowl.

## II. *Suitability of the Arizona Snow Bowl for additional facilities and use.*

Appellants, on behalf of further development contend the permitted area is suitable for additional winter-sports development and use as proposed. They rely on slope, terrain, aspect, soil, and vegetation conditions and on temperature and precipitation records included in the Environmental Statement. They point out the subject slopes were successfully used for skiing purposes in the past and that portions of the slopes to be served by proposed chair lift no. 3 are currently used in connection with the four existing surface lifts.

Appellants in opposition to development contend certain terrain is likely to receive insufficient and unreliable snow cover to support skiing. The Regional Forester's February 7 decision is based in part on apprehensions of the suitability of the site to support an "outstanding" or "top notch" ski area when measured against national standards.

The record shows that snow accumulation was adequate to support skiing for 13 out of the 18 years reliable snow depth data was available. For those five "bad" years, a diminished level of skiing use occurred.

The Arizona Snow Bowl has been operated commercially for almost 40 years, and for non-commercial purposes for a short period prior to that time.

During the period from 1938 until the lodge burned in 1952, the slopes to be served by proposed lift no. 3 were used for skiing purposes. Several appellants who used the area during that time period contend that snow conditions were suitable for skiing purposes during the winter-sports season. Those contending snow conditions may be inadequate offered no data to support such a conclusion.

The Final Environmental Statement contains snowfall and snow accumulation data, part of which is based on correlation with Fort Valley weather station data, a site located several

miles from the ski area and at a lower elevation. One appellant questions the manner in which the correlation was done. However, the snow dependability dispute seems to center around the permanence of the snow pack within the area north and east of the proposed lodge rather than on the total amount of snowfall. Due to the west facing aspect, the snow accumulation here is subjected to higher daily afternoon maximum temperatures with expected attendant snow melt and greater dissipation of snow pack than that which occurs on the currently developed slopes.

During years with average or greater than average snowfall, the slopes to be served by the proposed new lifts numbers 3 and 7 would likely be suitable for use during most all of the skiing season. However, during years with less than average snowfall, these particular slopes could be unsuitable for skiing use for a portion of the season even though the remainder of the area may continue to be suitable for such use. Under such adverse circumstances, the area would be able to accommodate fewer skiers and provide fewer visitor days of service. Gross revenue and operating margins would likely suffer during such circumstances. This is part of the risk weather-dependent businesses must bear. Most ski area operators accept this type of financial risk to varying degrees.

As evidenced by their application and proposal to provide additional facilities, the permittee apparently feels the risk is worth taking. As the landowner, the Government provides no guarantee the operation will be financially successful. Although there may be some risk of interruption to the availability of public service at the site, new development and use will create little financial risk to the Government.

The determination of suitability is discretionary. Although there may be some areas within the ski area more suitable for skiing use than others, in my judgment, the weight of the evidence supports the conclusion that the area on which development and use is proposed is sufficiently suitable to accommo-

date winter sports activities. It is clear that by developing additional facilities, capacity for use will be increased. Greater skier visitation will be possible than without the new development.

As was brought out in the Final Environmental Statement and by a number of appellants, the Arizona Snow Bowl is one of four developed ski areas in the State. Due to insufficient snow accumulation except at the higher elevations, there are limited sites in Arizona which might be developed to serve the growing alpine skier population. Along with a number of appellants, the Regional Forester points out the site is one of the best, if not the best skiing opportunity in the State. The Snow Bowl takes on added importance because of the lack of skiing opportunities available to Arizona skiers. If the development proposal were denied, skiers would have to travel to more remote locations such as New Mexico, Colorado, Utah and California with attendant increases in travel related energy consumption.

### *Finding*

In summary, I find the undeveloped terrain on which additional facilities are proposed to be sufficiently suitable for skiing use to warrant approval. Increased public benefits in the form of greater skier visitation can be expected. Central Arizona skier demand can be satisfied in a more energy efficient manner at the Arizona Snow Bowl than at alternate locations. Approval of the proposed new facilities is consistent with Forest Service policy.

### *Other Points of Appeal*

With few exceptions, I find the Regional Forester and Forest Supervisor fully and properly responded to issues identified by appellants. However, my finding as presented above have some bearing on certain of these issues. For continuity

and understanding, I will address each of the 16 points of appeal identified by appellants of the Regional Forester's February 7, 1980, decision.

*A. Arizona Snow Bowl was not properly evaluated as to its importance to Arizona Skiers.*

My findings as discussed above have the effect of mootting this issue, however, an explanation of Forest Service policies and goals is in order. The pertinent policy is summarized and paraphrased as follows:

To the extent there is a public demand and suitable National Forest land available to satisfy the demand, the use of such land for winter sports or similar outdoor recreation activities will be permitted subject to conditions necessary to mitigate possible conflicts and to protect the environment and the health and safety of the public.

It is evident there is local and regional demand in Flagstaff and Arizona for downhill skiing services and that the Arizona Snow Bowl through provision of additional facilities and services can satisfy some of the demand within acceptable environmental constraints. To the extent the addition of facilities at the Arizona Snow Bowl can satisfy demands of Arizona skiers, then it is consistent with Forest Service policy to allow such additions.

*B. The Regional Forester's decision will increase accidents at Arizona Snow Bowl.*

My findings above have the effect of mootting this issue. However, I agree with the Regional Forester's responsive statement on this point.

- C. *The Regional Forester's decision will result in the failure of Arizona Snow Bowl and elimination of all alpine skiing on Francisco Peaks.*

My findings above have the effect of mootting this issue.

- D. *The economy of Flagstaff will be adversely affected by the Regional Forester's decision.*

My findings above have the effect of mootting this issue.

- E. *Native American religious considerations exerted too much influence on the Regional Forester's decision.*

It is evident from review of the record that religious-based issues were of paramount concern to both the Regional Forester and the Forest Supervisor in their respective decisions. The documentation on this point is extensive. A multitude of information, arguments, and points of view were presented by appellants, intervenors, and parties to the appeal. The analyses of this material by the Forest Supervisor in reaching his decision and by the Regional Forester in reviewing that decision clearly reflect their sincere concern that the rights of Native American religious practitioners be fully protected. The importance of this issue to the Navajo and Hopi people is apparent. It was necessary for the Regional Forester to examine the religious considerations and present the rationale in detail in support of his conclusion.

- F. *Statutory and Constitutional protection of Native American religions has been violated by not requiring total removal of all ski facilities.*

I agree with the rationale contained in the Regional Forester's Responsive Statement.

- G. *Trust and Fiduciary duty owed to Native Americans has not been properly redeemed by the decision.*

The Regional Forester has properly responded to this point. Forest Service fiduciary responsibilities to Native Americans are identical to those afforded to all other members of society.

- H. *The Endangered Species Act of 1973 has been violated by the Regional Forester's decision.*

This point was answered fully in the Regional Forester's decision and Responsive Statement. There is no violation of the Act.

- I. *The National Environmental Policy Act (NEPA) has been violated by the Regional Forester's decision.*

The Final Environmental Statement and all of the preceding steps examines and considers the social, economic, and environmental factors attendant with the various alternative decisions. Both the Supervisor in his decision and the Regional Forester in his review of the decision acted in full concert with NEPA.

- J. *Regional Forester's decision violated the Code of Federal Regulations (36 CFR 211.19m) in that he based his decision on factors other than those contained within the Administrative Review Record.*

The administrative review process as prescribed by the regulation provides latitude to the reviewing officer in utilizing such documents and other information as may be required to reach a decision. The Regional Forester as reviewing officer acted within the scope of the regulations even though he reached a different conclusion than the Forest Supervisor.



- K. *The decision of the Regional Forester constitutes an abuse of discretion in that his powers were used for an improper purpose.*

This point is without foundation. There is no evidence of abuse of discretion.

- L. *The decision is an abuse of discretion because it departs from the established practice in similar cases.*

I agree with the conclusions presented in the Regional Forester's Responsive Statement.

- M. *The decision of the Regional Forester is in violation of the Federal Administrative Procedures Act and should be set aside.*

The Administrative Procedure Act is not operative here. The discretionary nature of the decision exempts it from the provisions of the Act.

- N. *The "balancing act" of the Regional Forester's decision is not allowable in that it is based on a misconception of law by the agency.*

My findings above have the effect of mootng this issue.

- O. *The decision of the Regional Forester constitutes a determination of equity between two opposing interests that should not be allowed to stand in equity since one of the interests is guilty of laches.*

I concur with the Regional Forester's comments as included in the Responsive Statement. There apparently is misunderstanding on the part of this appellant in regard to the land

management planning process used by the Forest Service. The Land Use Plan for the San Francisco Peaks did not address the nature and extent that the Snow Bowl area might be developed, so there was only limited basis on which concerned persons might protest the subsequent proposal for new facilities.

- P. *The mitigation of the decision is inadequate and gives evidence of the Regional Forester's lack of diligence in examining the effect and scope of his decision.*

I agree with the Regional Forester's comments on this point.

#### *Summary of Findings*

1. No legally protected religious rights have been abridged as a result of past development and use, and no such rights are likely to be abridged should additional facilities and use be authorized at the Arizona Snow Bowl.

2. The suitability analysis as included under point "A" of the Responsive Statement fails to present fully persuasive evidence or data supportive of the decision.

3. The undeveloped terrain on which additional facilities are proposed is sufficiently suitable for skiing use to warrant approval.

#### *Decision*

Accordingly, I am reversing the February 7, 1980, decision and restoring in full the February 27, 1979, decision of the Forest Supervisor which conditionally authorizes construction of additional facilities and reconstruction and improvement of the Snow Bowl Road.

As provided by the Final Environmental Statement, traditional Indian religious practices will continue to be permitted. As has occurred in the past, the San Francisco Peaks including the Arizona Snow Bowl can continue to provide religious as well as secular benefits to the using public.

A copy of this decision has been made available to the Secretary of Agriculture in accordance with 36 CFR 211.19 (j) (2). On his own initiative, the Secretary may decide to review the decision within 10 days of receipt. The Secretary will not consider any request for such review. In the event the Secretary does not review the decision within 10 days of receipt, this decision will constitute the final administrative decision of the Department of Agriculture.

R. MAX PETERSON  
Chief

## APPENDIX "G"

Judgment of the Court of Appeals and  
Orders Denying Rehearing and Rehearing *En Banc*

UNITED STATES COURT OF APPEALS  
for the District of Columbia Circuit

SEPTEMBER TERM 1982

Civil Action No. 81-00558

No. 81-1905

May 20, 1983

Richard F. Wilson, et al.

*Appellants.*

v.

John R. Block, Secretary of Agriculture, et al.

*Appellees.*

*And Consolidated Case Nos. 81-1912 and 81-1956*

BEFORE: Tamm and Ginsburg, Circuit Judges; and Lumbard,\*  
Senior Circuit Judge, U.S. Court of Appeals for the  
Second Circuit.

### JUDGMENT ENTRY

Clerk's Docket Entry, May 20, 1983

Judgment by this Court that the judgment of the District  
Court is hereby affirmed, in accordance with the opinion of this  
Court filed herein this date.

FOR THE COURT:

George A. Fisher, Clerk

\*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS  
for the District of Columbia Circuit

SEPTEMBER TERM 1982

Civil Action No. 81-00481

No. 81-1912

July 14, 1983

The Hopi Indian Tribe

*Appellant,*

v.

John R. Block, Secretary of Agriculture, et al.

*Appellees*

*And Consolidated Case Nos. 81-1905,  
81-1956, 82-1705 and 82-1706*

BEFORE: Tamm and Ginsburg, Circuit Judges, and Lumbard,\*  
Senior Circuit Judge, U.S. Court of Appeals for the  
Second Circuit.

O R D E R

On consideration of the Petition for Rehearing of Appellant, filed June 23, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

FOR THE COURT:

George A. Fisher, Clerk

By: Robert A. Bonner  
Chief Deputy Clerk

\*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS

for the District of Columbia Circuit

SEPTEMBER TERM 1982

Civil Action No. 81-00481

No. 81-1912

July 14, 1982

The Hopi Indian Tribe

*Appellant,*

v.

John R. Block, Secretary of Agriculture, et al.

*Appellees*

*And Consolidated Case Nos. 81-1905,*

*81-1956, 82-1705 and 82-1706*

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges and Lumbard,\* Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit.

ORDER

The Suggestion for Rehearing *en banc* of Appellant, filed June 23, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

FOR THE COURT:

George A. Fisher, Clerk

By: Robert A. Bonner

Chief Deputy Clerk

\*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS  
for the District of Columbia Circuit

SEPTEMBER TERM  
1982

Civil Action No. 81-00558

July 26, 1983

No. 81-1905

Richard F. Wilson, et al.

*Appellants*

v.

John R. Block, Secretary of Agriculture, et al.

*Appellees.*

*And Consolidated Case Nos. 81-1912 and 81-1956*

BEFORE: Tamm and Ginsburg, Circuit Judges; and Lumbard,\*  
Senior Circuit Judge, U.S. Court of Appeals for the  
Second Circuit.

ORDER

On consideration of the Petition for Rehearing of the  
Navajo Medicinemen's Association, et al., filed July 6, 1983,  
it is

ORDERED by the Court that the aforesaid Petition is  
denied.

*Per Curiam*

FOR THE COURT:  
George A. Fisher, Clerk

By: Daniel M. Cathey  
First Deputy Clerk

\*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).



UNITED STATES COURT OF APPEALS  
for the District of Columbia Circuit

SEPTEMBER TERM  
1982

Civil Action No. 81-00558

July 26, 1983

No. 81-1905

Richard F. Wilson, et al.

*Appellants*

v.

John R. Block, Secretary of Agriculture, et al.

*Appellees*

*And Consolidated Case Nos. 81-1912 and 81-1956*

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey,  
Wald, Mikva, Edwards, Ginsburg, Bork and Scalia,  
Circuit Judges; and Lumbard,\* Senior Circuit Judge,  
U.S. Court of Appeals for the Second Circuit.

ORDER

The Suggestion for Rehearing *en banc* of the Navajo Medicinemen's Association, et al., filed July 6, 1983 has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

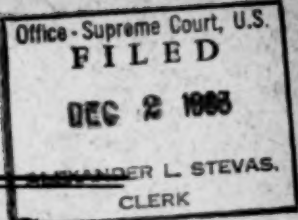
*Per Curiam*

FOR THE COURT:  
George A. Fisher, Clerk

By: Daniel M. Cathey  
First Deputy Clerk

\*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

Nos. 83-589 and 83-669



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**In the Supreme Court of the United States**

OCTOBER TERM, 1983

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**HOPÍ INDIAN TRIBE, PETITIONER**

v.

**JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.**

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**NAVAJO MEDICINEMEN'S ASSOCIATION, ET AL., PETITIONERS**

v.

**JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.**

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

---

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### **QUESTION PRESENTED**

Whether the expansion of a ski facility that has existed for more than 50 years on the San Francisco Peaks in the Coconino National Forest violates the First Amendment rights of Indians to freely exercise their religious beliefs and practices when the government has not denied or restricted the Indians' access to their sacred sites and the Indians failed to show that their essential religious practices must be conducted only in the small portion of the Peaks devoted to the ski facility.

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# **In the Supreme Court of the United States**

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*ON PETITIONS FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION**

---

## **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-50)<sup>1</sup> is reported at 708 F.2d 735. The district court's memorandum opinions (Pet. App. 51-82 and 93-102) are unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on May 20, 1983. Petitions for rehearing, filed by the Hopi Indian Tribe and the Navajo Medicinemen's Association, were

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<sup>1</sup>"Pet. App." refers to the appendix to the petition in No. 83-589.



denied on July 14, 1983, and July 26, 1983, respectively (Pet. App. 148-151). The petition for a writ of certiorari in No. 83-589 was filed on October 7, 1983, and the petition for a writ of certiorari in No. 83-669 was filed on October 21, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the First Amendment to the United States Constitution and the American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469, 42 U.S.C. (Supp. V) 1996, are set forth at pages 3-6 of the petition in No. 83-589.

### STATEMENT

1. Coconino National Forest belongs to the United States. It was established by Presidential Proclamation No. 818 on July 2, 1908 (35 Stat. 2196). Congress has placed the administration of that national forest in the Department of Agriculture, pursuant to the provisions of 16 U.S.C. 482n, 482n-3, 497, 528, 531, and 551.

The San Francisco Peaks is a mountain that encompasses 75,000 acres and rises to 12,633 feet, the highest point in Arizona (Pet. App. 4-5). Ski facilities have existed within a 777-acre portion of the San Francisco Peaks since the mid-1930's (*id.* at 5). During this period, the United States Forest Service built a ski lodge at what is now the Snow Bowl picnic ground, and the Civilian Conservation Corps built a road to the lodge. The present ski lodge was built in 1956. The ski facility utilized a rope tow as the primary uphill mode of transportation until 1958, when it was replaced by a Poma lift, which is still in use today. A chairlift was installed in 1962. With the exception of some new trail widening and small surface installation, the 777-acre permit area and facilities at the Snow Bowl have changed very little since 1962. *Ibid.*

The facility has been operated by various parties, and in April 1977 the special permit for the Snow Bowl operation in the national forest was transferred to Northland Recreation Co. (Pet. App. 5). In July 1977, Northland submitted to the Forest Service a master concept plan for future development within the existing permit area. The plan addressed the need for additional parking, lodge and uphill facilities, and additional slopes of varying skill levels. *Ibid.*

In late summer 1977, the Forest Service solicited alternatives to the proposed plan as part of its environmental analysis (Pet. App. 5). Ultimately, the Forest Service selected six alternatives to Northland's proposal, which were analyzed in a draft environmental impact statement. Special efforts were made to solicit comments from the Hopi and Navajo Indians, who regard the area as sacred. *Id.* at 6.

On December 31, 1980, after intermediate administrative proceedings, the Chief of the Forest Service issued a final agency decision. The alternative selected by the Forest Service provided for considerably less development than the master plan proposed by Northland (Pet. App. 133-145). The decision allowed a limited expansion of the Snow Bowl ski area within the existing permit boundaries and allowed improvement of the Arizona Snow Bowl Road under the "dual permit system."<sup>2</sup>

2. Three suits were filed to prevent the Forest Service from issuing permits to authorize the improvement of the recreational facilities within the Snow Bowl area. In one

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<sup>2</sup>Under the dual permit system, the Forest Service issues a long-term permit to build major improvements within 80 acres or less for a maximum of 30 years pursuant to 16 U.S.C. 497, together with a revocable permit to build less permanent improvements, such as ski lifts and trails, under 16 U.S.C. 551, which contains no limitation on acreage or time.

suit, the Wilsons, non-Indians who own nearby Fern Mountain Ranch, contended that the Forest Service's proposed actions violated the National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.*, and the regulations promulgated thereunder, 36 C.F.R. Pt. 800, and statutes regulating the management of the national forests. The Wilsons argued, first, that the Forest Service had violated the NHPA with respect to two National Register properties (one being the Wilsons' ranch) in the vicinity of the Snow Bowl;<sup>3</sup> and, second, that the Forest Service violated the Act when it declined to include the San Francisco Peaks themselves in the National Register. Pet. App. 79-82.

In the two other suits, the Hopi Tribe and the Navajo Medicinemen's Association, an association of persons who have received special training in religious beliefs and practices of the Navajo, alleged that the existence of — let alone the expansion of — a ski facility on the San Francisco Peaks would violate the Indians' free exercise rights under the First Amendment; the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. (Supp. V) 1996; an alleged trust responsibility between the federal government and Native Americans; and various environmental laws. In their suits, the Indian plaintiffs sought to have the existing facilities dismantled and removed. Pet. App. 52-53.

All parties filed cross-motions for summary judgment. On June 15, 1981, the district court entered summary judgment in favor of the government on all claims with the exception of that arising under the NHPA (Pet. App. 51-92). The NHPA claim was remanded to the Forest Service,

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<sup>3</sup>Specifically, the Wilsons argued that because the new ski lifts and slopes would be visible from their ranch, there would be an "adverse effect" under 36 C.F.R. 800.3(b), and that the increased tourist traffic would increase the dangers of trespassing, vandalism, and arson at their ranch. The Forest Service and the court of appeals analyzed and rejected these contentions. Pet. App. 38-40.

and the Forest Service was enjoined from permitting any improvement of the ski facility pending administrative remand proceedings. After completion of the administrative remand proceedings, the government filed a motion for entry of final judgment accompanied by a Notice of Compliance; the Indians filed motions under Rule 60(b), Fed. R. Civ. P., seeking relief from the June 15, 1981, judgment in which their claims had been rejected. Pet. App. 94-95.

On May 14, 1982, the district court denied the Indians' motions and granted the government's motion, finding that the agency proceedings on remand had satisfied the requirements of the NHPA (Pet. App. 93-102). Accordingly, the court vacated the injunction that had prevented the Forest Service from issuing the permits for the Snow Bowl improvements.

3. The court of appeals, in a comprehensive opinion, affirmed (Pet. App. 1-50). With respect to the religious freedom issues raised by petitioners, the court of appeals concluded that petitioners had failed to show that expansion of the ski facility would burden either their religious beliefs or practices (*id.* at 8-18); the court therefore found it unnecessary to consider whether the Forest Service's proposed action constituted a compelling governmental interest or whether the Forest Service had chosen the least restrictive means of achieving that interest (*id.* at 19).

Without in any way questioning the sincerity of petitioners' religious beliefs, the court of appeals concluded that the government had not penalized petitioners for their religious beliefs and that petitioners had failed to show "that expansion of the Snow Bowl will burden their freedom to believe" (Pet. App. 12). The court then separately considered whether the government's actions would burden petitioners in the *practice* of their religion. Eschewing any judicial inquiry into the importance, or "centrality," of particular

religious practices (*id.* at 15), but noting (*id.* at 13) that petitioners' religious practices are, in a certain sense, site-specific (some ceremonies must be performed on the Peaks and religious objects must be collected there), the court endorsed an inquiry focusing on "the importance of the geographic site in question to the practice of the [petitioners'] religion" (*id.* at 16). The court explained (*ibid.*) that:

If the [petitioners] cannot demonstrate that the government land at issue is indispensable to some religious practice, whether or not central to their religion, they have not justified a First Amendment claim. \* \* \* We thus hold that plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site.

Applying this analysis to petitioners' claim, the court of appeals concluded that, notwithstanding the indispensability of the Peaks to the practice of petitioners' religion, their claim swept too broadly (Pet. App. 17-18; emphasis added):

The Forest Service \* \* \* has not denied the [petitioners] access to the Peaks, but instead permits them free entry onto the Peaks and does not interfere with their ceremonies or the collection of ceremonial objects. At the same time, the evidence does *not* show the indispensability of that small portion of the Peaks encompassed by the Snow Bowl permit area. The [petitioners] have not shown that expansion of the ski area will prevent them from performing ceremonies or collecting objects that can be performed or collected in the Snow Bowl but nowhere else. The record evidence is, in fact, to the contrary. \* \* \* It must be remembered that the Snow Bowl permit area comprises only 777 of the 75,000 acres of the Peaks, and that prior construction on the Peaks has not prevented the [petitioners] from

practicing their religions. \* \* \* The [petitioners] simply have not demonstrated that development will prevent them from engaging in any religious practices.

The court of appeals also rejected petitioners' claim that the government had violated the American Indian Religious Freedom Act, 42 U.S.C. (Supp. V) 1996. The court concluded, after thorough examination of the legislative history, that AIRFA requires federal agencies to evaluate their policies and procedures with Indian religious practices in mind, but that the Act does not elevate Indian religious values over all competing government policies (Pet. App. 19-22). In this case, the court of appeals agreed with the district court's finding that the Forest Service had given the necessary consideration to petitioners' religious interests before deciding to approve additional development of the Snow Bowl (*id.* at 23).

These petitions for writs of certiorari followed. In addition to the instant petitions, the Wilsons filed a petition for a writ of certiorari (No. 83-282). This Court denied the Wilsons' petition on October 31, 1983.

#### ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. Petitioners' primary contention (83-589 Pet. 14-19; 83-669 Pet. 14 *et seq.*) is that the mere existence of — let alone the expansion of — a ski facility on the San Francisco Peaks amounts to an impermissible burden on traditional Native American religion within the meaning of the Free Exercise Clause of the First Amendment. But petitioners' plea for "religious accommodation" (83-669 Pet. 33) does not square with their contention that the First Amendment entitles Indians to compel the federal government to dedicate the entire 75,000-acre Peaks as a religious shrine, even



though the area is wholly within a national forest. (Petitioners' grievance is not confined to the fact that the Forest Service has permitted a ski facility on 777 acres of the Peaks. Petitioners also complain that the improvements attract tourists and recreators and enable them to reach the Peaks during the summer months. *Id.* at 22.).

In a number of prior cases, the courts have rejected claims virtually identical to those advanced by petitioners here. See *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983), *cert. denied*, No. 83-434 (Nov. 7, 1983); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980); *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *appeal pending on other grounds*, No. 82-3678 (9th Cir.).<sup>4</sup> These cases have employed the two-step analysis for evaluating Free Exercise claims established by this Court. See, e.g., *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). Under that analysis, a court first must determine whether the challenged governmental action creates a burden on the free exercise of religion. If it does not, the matter is at an end. If a burden is found, however, then it must be balanced against the government's interest in pursuing the challenged action. If a

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<sup>4</sup>Petitioners rely (83-589 Pet. 24; 83-669 Pet. 33-36) on one district court case to create a conflict. In *Northwest Indian Cemetery Protective Association v. Peterson*, 565 F. Supp. 586 (N.D. Cal. 1983), *appeal pending*, No. 83-2225 (9th Cir.), the district court, reversing its prior ruling on the denial of a preliminary injunction (552 F. Supp. 951), effectively set aside a 25-square-mile area of the Six Rivers National Forest, which certain Indians regard as sacred, as an Indian religious preserve by permanently enjoining the Forest Service from authorizing or conducting any commercial logging or road building, notwithstanding the Forest Service's plan to establish half-mile protective zones around sacred prayer sites. The government is appealing the district court's decision.



compelling governmental interest outweighs the religious interests, the Free Exercise claim must fall.

This analysis was followed by the court of appeals here (Pet. App. 9). Despite their protestations to the contrary (83-589 Pet. 15-19; 83-669 Pet. 17-26), petitioners' real quarrel is not with the legal test applied by the court of appeals, but rather with its fact-bound conclusion (Pet. App. 17-18) that petitioners failed to carry their burden of proof on the first prong of the analysis. That issue, on which the court of appeals was plainly correct, does not warrant this Court's review.

In contrast to *Badoni v. Higginson, supra*,<sup>5</sup> and *Sequoyah*

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<sup>5</sup>In *Badoni*, Navajo Indians asserted that the federal government's management of the Rainbow Bridge National Monument infringed on the Free Exercise Clause for two reasons. First, they claimed that the waters of Lake Powell had completely inundated sacred sites on Monument property, denying the Indians all access to those sacred sites. Second, they claimed that the number of tourists and their disrespectful conduct at the Monument prevented the Indians from conducting religious services. The court of appeals recognized that the Indians' claim did not fall within the generally recognized categories of Free Exercise violations because they alleged neither government compulsion to violate the tenets of their religion nor a benefit conditioned on renunciation of a religious practice. Rather, their claim was grounded on the conduct of tourists at the Monument. The court rejected this claim, concluding that what the Indians sought "in the name of the Free Exercise Clause is affirmative action by the government which implicates the Establishment Clause of the First Amendment" (638 F.2d at 178).

The court went on to explain (638 F.2d at 179, quoting *Ottens v. Baltimore & O.R.R.*, 205 F.2d 58, 61 (2d Cir. 1953)) that:

The First Amendment protects one against action by the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. . . . We must accommodate our idiosyncracies, religious as well as secular, to the compromises necessary in communal life.

Were it otherwise, the court of appeals reasoned, "the Monument would become a government-managed religious shrine" (*Badoni*, 638 F.2d at 179).

v. *TVA, supra*,<sup>6</sup> in which the courts rejected complaints similar to those advanced by petitioners even though in both cases the Indians were completely deprived of access to sacred sites due to flooding by government projects, in this case petitioners have not been deprived of access to the Peaks. The Forest Service allows "free entry onto the Peaks and does not interfere with [petitioners'] ceremonies or the collection of ceremonial objects." Pet. App. 17. Indians have, in fact, used the existing ski lifts to gain access to sacred sites in the Snow Bowl area. *Id.* at 60. The court of appeals stressed that the Indians' religious practices are not confined to the 777-acre permit area, but may occur in many locations on the sacred mountain. *Id.* at 17-18. Further, the court of appeals took note of the fact that the Snow Bowl has been in operation for nearly 50 years and that the Indians' religious practices and beliefs apparently have managed to co-exist with the diverse developments that have occurred there. *Id.* at 18.<sup>7</sup> These factual conclusions supporting the court of appeals' decision that the

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<sup>6</sup>In *Sequoyah*, Cherokee Indians sought to prevent completion of the Tellico Dam on the Little Tennessee River in Tennessee, alleging that the impoundment created by the dam would flood their sacred homeland, destroy sacred sites, medicine-gathering sites, holy places and cemeteries, and disturb the sacred balance of the land (620 F.2d at 1160). The court of appeals affirmed a grant of summary judgment in favor of TVA, ruling that to establish a burden on free exercise the plaintiffs had to prove that the valley to be flooded was "indispensable" or "central" to their ceremonies and practices. The court held that plaintiffs' proof was insufficient, as the evidence indicated that medicines in the valley could be obtained elsewhere and that the flooding would not prevent the plaintiffs from engaging in any particular religious observances.

<sup>7</sup>For example, the court noted that among the structures on the Peaks, in addition to the Snow Bowl, are natural gas, telephone, and electric transmission lines, water tanks for stock, and unimproved roads. Cinder extraction and mining have been conducted on the Peaks for at least the past 30 years. Pet. App. 18 n.6.

Forest Service has not impermissibly burdened petitioners' Free Exercise rights require no further review.

Petitioners' rhetorical question (83-669 Pet. 16-17) whether their claim is governed by "the First Amendment law written by this Court" needs no answer. The result reached by the court of appeals is indeed consistent with established First Amendment principles. The Constitution is designed to accommodate competing religious and secular values in a pluralistic society. The federal government here has made reasonable accommodations to the religious views of traditional Navajos and Hopis. The Constitution does not mandate that the 75,000-acre Peaks, the highest mountain in Arizona, be made into a religious shrine. At the very least, the cases establish that when the government affords Indians access to sacred sites, normal management activity pursuant to congressional authorization cannot amount to an impermissible burden on the Indians' First Amendment right to the free exercise of their religion. Stated otherwise, Indians cannot employ the First Amendment as a means to compel the federal government to set aside large areas of public land as religious preserves.<sup>8</sup>

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<sup>8</sup>We do not quarrel with petitioners' quotation (83-669 Pet. 38) from *Larkin v. Grendel's Den, Inc.*, No. 81-878 (Dec. 13, 1982), slip op. 8, that religious interests are "without question . . . entitled to substantial weight." The Court's holding in *Larkin*, however, was that a Massachusetts statute vesting power in governing bodies of churches to veto applications for liquor licenses within a 500-foot radius of a church violated the Establishment Clause of the First Amendment. Petitioners' demand that the federal government manage the Peaks in a manner that comports with their religious views presents an analogous problem. Petitioners' reliance (83-669 Pet. 39) on *Swomley v. Watt*, 526 F. Supp. 1271 (D.D.C. 1981), presumably to show how far the federal government may go in devoting public land to a sectarian religious use, is misplaced. The court in *Swomley* never reached the merits of the First Amendment claim; it dismissed the suit because plaintiffs lacked standing. See also *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

2. The court of appeals correctly concluded that Congress, in enacting the American Indian Religious Freedom Act, did not intend to set aside areas of public lands as religious sanctuaries.<sup>9</sup> As the court held, AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values. Pet. App. 19-23. The Act was intended only to heighten the federal government's sensitivity to the religious concerns of Native Americans; it was not intended to grant Indians any greater substantive rights than those guaranteed to all citizens by the First Amendment. See S. Rep. 95-709, 95th Cong., 2d Sess. 6 (1978); H.R. Rep. 95-1308, 95th Cong., 2d Sess. 1 (1978).<sup>10</sup> Thus, the court of appeals correctly held (Pet. App. 22) that AIRFA does not prohibit federal agencies from adopting land use policies that conflict with traditional Indian religious beliefs and practices, particularly when, as here, those Indian religious practices and the challenged land use have coexisted for years. An agency undertaking a land use project satisfies its obligations under AIRFA if, in the decisionmaking process, it obtains and considers the views of Indian leaders and if, in project implementation, it avoids

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<sup>9</sup>Petitioners rely (83-669 Pet. 41) on *Peyote Way Church of God, Inc. v. Smith*, 556 F.Supp. 632 (N.D. Tex. 1983), to suggest that their views on the management of public lands are buttressed by AIRFA. *Peyote Way* merely protects members of the Native American Church who believe in the use of peyote as a central sacrament; neither that case nor any other suggests that AIRFA enables Native Americans to dictate that public property be managed according to their wishes.

<sup>10</sup>Also instructive is Representative Udall's statement explaining why no hearings were held on the bill (124 Cong. Rec. 21446 (1978)):

No, there were no hearings held on the resolution. It just seemed so simple and so self-evident that it was merely a statement of policy that we just took it up in full committee and passed it unanimously.

unnecessary interference with Indian religious practices. The court of appeals' conclusion (*id.* at 23) that those requirements were fully met here does not warrant further review.

#### CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE

*Solicitor General*

F. HENRY HABICHT, II

*Assistant Attorney General*

ROBERT L. KLARQUIST

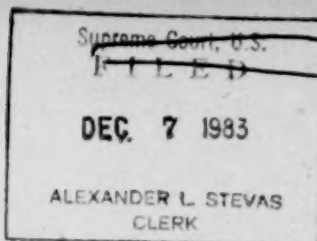
JACQUES B. GELIN

*Attorneys*

DECEMBER 1983

MOTION FILED

DEC 7 1983



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983

No. 83-589

HOPI INDIAN TRIBE, et. al.,

*Petitioners,*

v.

JOHN R. BLOCK, et. al.,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE AMICI CURIAE  
AND AMICI CURIAE MEMORANDUM

ALL INDIAN PUEBLO COUNCIL,  
AMERICAN INDIAN LAW CENTER,  
THE CHRISTIC INSTITUTE,  
INDIAN PUEBLO LEGAL SERVICES, INC.  
NATIONAL INDIAN YOUTH COUNCIL

IN SUPPORT OF REVERSAL

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NOVEMBER, 1983

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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PETITION FOR WRIT OF CERTIORARI  
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---

MOTION FOR LEAVE TO FILE  
BRIEF AMICUS CURIAE

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The National Indian Youth Council,  
Inc. (NIYC) and other amici hereby  
respectfully move pursuant to Rules  
36.1 and 42.(3) of its Rules of Practice,  
for leave to file the attached brief  
as amici curiae in support of petitioners  
effort to seek review of First Amendment  
questions concerning the extent to which



the Constitution protects Indian religious freedom.

This motion and the attached brief are timely filed within the time allowed for filing of respondents' brief on the petition for certiorari.

Amicus curiae are Indian nations, Indian Rights organizations, churches and civil liberties organizations all of which have been involved in issues of religious freedom.

The proposed brief of amici addresses issues not fully developed by the parties. Amici believes that the court below erred in its First Amendment free exercise analysis. This error was based, in part, on the unique nature of Indian free exercise claims when compared with Judeo-Christian free exercise claims and viewed from the history of federal Indian policy.

Amici have requested the consent of the parties to appear. The petitioners have granted such consent, but the respondents have not responded to amici request and therefore, amici assumes that respondents have declined. For the above reasons, amici respectfully move this Court for leave to file the attached brief amici curiae in support of granting writ of certiorari.

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National Indian Youth Council

## QUESTIONS PRESENTED

- I. May the National Park Services discriminate between Judeo-Christian religions and traditional Indian religions by licensing and encouraging the use of Park Service areas by the first and refusing to make reasonable accommodations for use by the second?
- II. Must Indian religions adherents show that the practice of their religion will be absolutely prevented before they are afford the protections of the First Amendment?
- III. Will accommodations of Indian religious practices on federal lands create unmanageable problems for federal land managers?

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PETITION FOR WRIT OF CERTIORARI  
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---

BRIEF AMICUS CURIAE OF  
NATIONAL INDIAN YOUTH COUNCIL, et. al.

---

The organizations joined herein  
file this brief Amicus Curiae in support  
of the petition of Hopi Indian Tribe,  
et. al. pursuant to Rule 36.1 of the  
Rules of the Supreme Court.

STATEMENTS OF INTEREST OF AMICI CURIAE  
All Indian Pueblo Council

The All Indian Pueblo Council (AIPC)

represents nineteen Indian Pueblos in New Mexico. AIPC has participated, on behalf of the Pueblos, in challenges to specific resource development when the proposed development impaired access by Pueblo Indians to traditional religious sites.

#### American Indian Law Center

The American Indian Law Center is a non-profit Indian rights organization with expertise in Tribal government and the management of federal, state and tribal jurisdictional relationships. The Center was the principal author of the American Indian Religious Freedom Act Report, cited herein, and relied on by amici in support of the petition for certiorari.

#### The Christic Institute

The Christic Institute is a public interest law firm and policy center

established in 1980 to bring spiritual and religious values to bear, in both traditional and contemporary ways, on public consciousness and policy making. The Institute is particularly sensitive to erosion of the constitutional guarantee of of the free exercise of religion.

Indian Pueblo Legal Services, Inc.

Indian Pueblo Legal Services (IPLS) is a legal services corporation grantee that serves the nineteen Indian Pueblos in New Mexico. IPLS has represented individual Indians in numerous First Amendment cases and supports the development of legal standards that address the unique nature of Indian First Amendment claims.

National Indian Youth Council

The National Indian Youth Council, Inc. (NIYC) is a national non-profit Indian organization which was formed

in Gallup, New Mexico in 1961. NIYC has engaged in a number of activities to preserve and enrich traditional Indian communities and protect Indian traditions on and off the reservation. Toward that end NIYC has been extensively involved in litigation which has sought to insure the survival of American Indian religions, see Sequoyah v. T.V.A., 620 F.2d 1159 (6th Cir. 1980), cert. denied, 449 U.S. 953 (1981) and Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) cert. denied, 452 U.S. 954 (1981). NIYC participated in this case as an amicus curiae in the Court of Appeals and hopes to inform the Court as to specific issues not addressed by the parties in this matter.

#### ARGUMENT

- I. THE DECISION OF THE COURT OF APPEALS PERMITS THE NATIONAL PARK SERVICE'S CONTINUED DISCRIMINATION IN FAVOR

OF NON-INDIAN RELIGIONS, AND AGAINST TRADITIONAL INDIAN RELIGIONS. THIS CONSTITUTES AN INVIDIOUS RELIGIOUS, RACIAL, AND CULTURAL DISCRIMINATION PROHIBITED BY THE FIRST AND FIFTH AMENDMENTS.

The National Park Service discriminates among religions, encouraging the majority Christian faiths to operate religious facilities on federal lands, but prohibiting the adherents of minority traditional Indian religions from practicing their religions on those same lands. While the National Parks Service has put aside over a hundred separate locations for Christian worship, it now claims that the governmental need for more skiing areas in Arizona makes it impossible to accommodate the need for religious use of the most holy Navajo and Hopi religious sites. Whether characterized as a violation of the free exercise clause of the First Amendment or a violation of the equal

protection principles incorporated in the due process clause of the Fifth Amendment, see Bolling v. Sharpe, 347 U.S. 497 (1954), this federal action constitutes an invidious discrimination on the basis of religion, race and culture.

There is no doubt that the First and Fifth Amendments protect Indians as a class. See Morton v. Mancari, 417 U.S. 535 (1974). The United States has never argued that the beliefs of the petitioners are other than sincerely held religious beliefs, and neither the United States nor any Court below has suggested that the Navajo or Hopi traditional religious practices are "so bizarre, or so non-religious in motivation, as not to be entitled to protection under the Free Exercise Clause" Thomas v. Review Board of the Indiana Employment Security

Division, 450 U.S. 707, 715 (1981). Thus, these religious beliefs are entitled to the full measure of protection afforded to Judeo-Christian religions.

Jews and Christians practice their religions in this country without dependence on any particular physical location, and thus, we have come to think of religion as independent of the use of special religious sites. In part, this is because the sites holy to most Jews and Christians are in distant locations. The federal government has not only recognized the significance of the foreign Christian religious sites but it expends federal money to duplicate one of them - the city of Jerusalem - in a federal wildlife refuge. The Department of Agriculture refuses to recognize the Navajo and Hopi religious



interests in land in the instant case, however, the Department of Interior sanctions the operation of "Holy City" in the Wichita Mountain Wildlife Refuge. See Swomley v. Watt, 526 F. Supp. 1271, 1272 (D.D.C. 1981) (dismissed for lack of standing).

Traditional Indian religious sites are located within this country. For well known historical and political reasons, virtually all of those sites are located on land controlled by the federal government. Thus, the federal government's insensitivity to Indian religious beliefs has an especially high First Amendment cost. There is no alternative place of worship for many Indian religious practices, and the federal government's insensitivity to these needs will necessarily lead

to the destruction of the Indian religions.<sup>1</sup>

This fear is not a hypothetical one, and a number of recent lower federal court decisions may have hastened the demise of Indian religions. For example, the Cherokee in Sequoyah v. T.V.A., 620 F.2d 1159 (6th Cir. 1981), cert. denied, 449 U.S. 953 (1980), the Navajo in Badoni v. Higginson, 638 F. 2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981), the Cheyenne and Lakota in Fools Crow v. Gullet, 541 F. Supp.

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1. No Christian or Jew could fail to be offended by Jordanian government's decision to build a major tourist facility - the Intercontinental Hotel - on the Mount of Olives. The fact that the most ancient Jewish headstones were used in construction made the government's action particularly offensive. The government's proposed ski area provides exactly the same offense to Navajo and Hopi religious adherents. The First Amendment ought to prohibit in this nation the kind of governmental conduct that was so destructive in Jerusalem.

785 (D.S.D. 1982), (8th Cir. May 10, 1983, No. 82-1852, Cert. petition filed October, 1983), the Inupiat in Inupiat Community of Arctic Slope v. U.S., 548 F. Supp. 182 (D. Alaska 1982), and in the instant case seeking review Wilson v. Block, 708 F.2d. 735 (1983), all lost in their efforts to protect religious sites under federal ownership. The only decision finding that the actions of the federal public land manager were proscribed by the free exercise clause is Northwest Indian Cemetery Protective Association v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), appeal pending, (9th Cir. No. 83-2225). In all of the above cases, as in the instant case, the public lands were under Indian control prior to their expropriation by the federal government. The current public uses of these federal public lands is

inconsistent with the constitutionally protected Indian religion practices and beliefs.

The government does not prohibit all religious activities on federal public land. In contrast to its insensitivity to traditional Indian religious beliefs, the government sanctions and even encourages religious worship on public lands by practitioners of more established Judeo-Christian denominations. In addition to the National Wildlife Refuge's "Holy City", the National Park Service currently manages 121 churches in its National Parks. Sectarian religious services are regularly held at privately owned churches designated as national historical sites and operated by the National Park Service, and the National Park Service also owns and operates churches at many National Parks.

The federal government effectively prohibits Indian religious practices and beliefs on federal land and promotes the practice and beliefs of more established religions. Any government program that has the effect of discriminating among religious faiths "must be invalidated unless it is justified by a compelling governmental interest, cf. Widmar v. Vincent, 454 U.S. 263, 269-270 (1980), and unless it is closely fitted to further that interest, Murdock v. Pennsylvania, 319 U.S. 105, 116-117 (1943)." Larson v. Valente, 456 U.S. 228, 247, (1982). No party has even suggested that the operation of a ski area could meet this test.

The federal government should not be permitted to discriminate among religious faiths on federal public lands.

To urge and facilitate the development of Judeo-Christian religions on national public lands while at the same time destroying Indian religions on the same lands constitutes invidious racial, religious, and cultural discrimination by the federal government. The government can show no compelling governmental interest to justify this discrimination.

II. PRACTITIONERS OF INDIAN RELIGIONS NEED NOT SHOW A GREATER BURDEN ON THEIR RELIGIOUS PRACTICES THAN MUST PRACTITIONERS OF JUDEO-CHRISTIAN RELIGIONS TO PARTAKE OF THE PROTECTIONS OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The Court of Appeals failed to apply this Court's Free Exercise analysis to the Hopi and Navajo claim that the actions of the forest service burden their Free Exercise of religion. As the Court stated in its most recent term:

"This Court has long held the Free Exercise Clause of the First Amendment

an absolute prohibition against governmental regulations of religious beliefs, Wisconsin v. Yoder, 406 U.S. 205, 219 (1972); Sherbert v. Verner, 374 U.S. 398, 402 (1963); Cantwell v. Connecticut, 310 U.S. 269, 303 (1940). As interpreted by this Court, moreover, the Free Exercise Clause provides substantial protection for lawful conduct grounded in religious beliefs, see Wisconsin v. Yoder, supra, 406 U.S., at 220; Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981); Sherbert v. Verner, supra 374, U.S., at 402-403. However, "(n)ot all burdens on religion are unconstitutional. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." United States v. Lee, 455 U.S. 252, 257-258 (1982) (citations omitted). See, e.g., McDaniel v. Paty, 435 U.S. 618, 628 and N.8 (1978); Wisconsin v. Yoder, supra, 406 U.S., at 215; Gallette v. United States, 401, U.S. 437 (1971)." Bob Jones University v. U.S., 51 U.S.L.W. 4593, 4601\_\_U.S.\_\_(1983).

The Courts below required the Indian religious adherents to show that the practice of their religions would be absolutely prevented (not burdened) by the development of the ski resort before



these Courts would even apply the First Amendment balancing test. at 744. In addition, the Court of Appeals held that the Indians must show that the proposed government action "penalized Plaintiffs for their beliefs." at 742. (emphasis added).

The lower Courts did not properly apply this Court's First Amendment analysis. The tests applied in the lower Courts imposes a greater burden of proof on adherents of Indian religions to show that their free exercise is burdened than is imposed on any other religion making a similar claim.

III A HOLDING IN FAVOR OF PETITIONERS  
IN THIS CASE WOULD NOT CREATE A  
VETO POWER OVER FEDERAL LAND USE  
BY RELIGIOUS ADHERENTS.

The history of federal Indian policy in the United States has been characterized by dramatic shifts in perspective. At

one time the official federal policy of the United States was to oppress and assimilate Indians into the mainstream of society. A central part of this policy was the suppression of Indian religions. It is well documented that in the nineteenth century the United States government allocated various Indian tribes to specific religious sects to indoctrinate the tribes into the mainstream of non-Indian society. In accordance with this federal policy, anything associated with Indian religions was ruthlessly suppressed. See generally, F. Prucha, American Indian Policy Crisis, (Norman: University of Oklahoma Press, 1976).

Since federal land managers get their policy guidance from the general temper of the times, the federal land managers had, as a matter of course, prohibited Indian access to sacred sites.

The policy of suppression has been thoroughly discredited and a new era of Indian administration was instituted by John Collier in the 1930's and despite the ups and downs of the last fifty years of federal Indian policy, no one would seriously contend that the policies of religious suppression should be reinstituted. In accordance with the renewed policy of supporting Indian cultures, the American Indian Religious Freedom Act, Public Law 95-341, 96 Stat. 469 (1978) 42 U.S.C. 1996, was passed to remedy and alleviate past policy practices of the suppression of Indian religions.

The Act became effective August 11, 1978. Section 1 of the Act reads as follows.

"On and after August 11, 1978 it shall be a policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express,

and exercise the traditional religions of the American Indian, Eskimos, Aluet, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Under the authority of Section 2 of the Act a Task Force prepared a report documenting areas of conflict and procedural changes necessary to effectuate the policies of the Act. The American Indian Religious Freedom Act Report, (U.S. Department of Interior: 1979), identified problems of Indian religious access in twenty states that affected over forty tribes. The types of access problems that would be presented to federal agencies and to Federal Courts are certainly manageable and it is unlikely that a new host of access problems will arise in the future. Implied in the Sequoyah, Badoni, Fools Crow, Inupiat, and Wilson holdings is that Indian religious adherents would have a veto

power to all federal land use. The implied argument that a dying religion of a tiny minority seeking a permanent open-end religious easement on all federal property that would effectively control federal use and enjoyment of public lands is unwarranted. After centuries of official federal policy designed to destroy Indian cultures and religions, Indian societies, in accord with current federal policy, are renewing their efforts to sustain themselves. The Task Force Report has identified all potential religious access claims and no further claims are likely to arise. Federal land managers already have at their convenience an existing document, the American Indian Religious Freedom Act Report, in which to identify all Indian religions access claims and make reasonable accommodations for Indian religious interests.

## CONCLUSION

The Petition for Writ of Certiorari demonstrates that the Court of Appeals made a clear error on an issue of national significance. Thus, it should be granted.

Respectfully submitted,

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